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No. _____

In The

Supreme Court of the United States

ALLEN BREAUX
and
JOE AMBROGIO,

Petitioners,

v.

CITY OF GARLAND, TERRY HENSLEY
and RON HOLIFIELD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether retaliatory governmental actions that have the *effect* of punishing and inhibiting public employees' speech on matters of public concern can be insulated from First Amendment liability merely because of the *form* of the retaliatory action?

II. Whether a campaign of retaliatory harassment that is sufficiently severe, under the standard applied by the majority of the circuits, to chill a person of ordinary firmness from exercising First Amendment rights, can ever be insufficient as a matter of law to constitute an actionable First Amendment injury?

III. Whether a campaign of retaliatory harassment directed toward police officers, orchestrated by their superiors and motivated by the officers' speech on a matter of public concern (abuses of power within the Department), is too trivial to support a First Amendment cause of action when the adverse employment actions the officers suffered were: 1) a series of "trumped up" Internal Affairs charges; 2) repeated interrogations during one-sided "investigations" of the charges; 3) suspension following a "hearing" presided over by the Chief of Police, the primary culprit behind both the abuse of power reported by the officers and the retaliation; 4) defamatory public reprimands posted on the Department's "Wall of Shame" and disseminated to the media; 5) a 3½ day mental stability exam; 6) gag orders that continued even *after* the charges against the officers were "resolved" and that prevented them from defending their reputations; and 7) threats to terminate the officers in an attempt to pressure them to sign false confessions in the form of apology letters drafted by the Police Chief for their signature?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

(a) Statement of Facts 1

(b) Course of Proceedings and Dispositions 9

REASONS FOR GRANTING THE WRIT 13

I. The Fifth Circuit's Analysis of "Adverse Employment Action" in *Breaux* Stands in Direct Contravention of this Court's Settled View That Public Employees Suffer Actionable First Amendment Injury When Governmental Retaliation – No Matter What Mode of Retaliatory Weapon the Government Selects – is Sufficiently Severe to Penalize and Inhibit Their Exercise of First Amendment Rights 13

II. The Fifth Circuit's Analysis in *Breaux* Reflects a Split in the Circuits, the Majority of Which Determine the First Amendment Significance of Governmental Retaliation According to an Objective "Chilling" Standard 22

CONCLUSION 27

APPENDIX A-1

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Board of Commissioners v. Umbehr, 511 U.S. 668 (1995) 14, 15, 18, 21

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 13

Connick v. Myers, 461 U.S. 138 (1983) 13

Elrod v. Burns, 427 U.S. 347 (1976) 17

Gooding v. Wilson, 405 U.S. 518 (1972) 13

Houston v. Hill, 482 U.S. 451 (1987) 13

Paul v. Davis, 424 U.S. 693 (1976) 11

Perry v. Sindermann, 408 U.S. 593 (1972) 11, 14, 16

Pickering v. Board of Education, 391 U.S. 563 (1968) 12, 13, 14, 15, 21

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) ..... *passim*

Texas v. Johnson, 491 U.S. 397 (1989) 13

United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) 19, 20

Waters v. Churchill, 511 U.S. 661 (1994) 14

CIRCUIT COURT CASES

ACLU v. Wicomico County, 999 F.2d 780 (4th Cir. 1993) 24

Agosto de Feliciano v. Aponte Roque, 889 F.2d 1209 (1st Cir. 1989) 23

Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987) 23, 26

Bart v. Telford, 677 F.2d 622 (7th Cir. 1982) 26

TABLE OF AUTHORITIES – Continued

Page

Bennis v. Gable, 823 F.2d 723 (3rd Cir. 1987) 22

Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998)..... 23

Breaux v. City of Garland,
205 F.3d 150 (5th Cir. 2000)..... *passim*

Delong v. United States, 621 F.2d 618 (4th Cir. 1980) 24

DiMeglio v. Haines, 45 F.3d 790 (4th Cir. 1995)..... 24

Goffer v. Marbury, 956 F.2d 1045 (11th Cir. 1992)..... 23

Lieberman v. Reisman, 857 F.2d 896 (2nd Cir. 1988) 22

Piecynski v. Duffy,
875 F.2d 1331 (7th Cir. 1989).....23, 26

Suppan v. Dadonna,
203 F.3d 228 (3rd Cir. 2000).....23, 26

Tao v. Freeh, 27 F.3d 635 (D.C. Cir. 1994) 23

Walsh v. Ward, 991 F.2d 1344 (7th Cir. 1993)..... 26

Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982) 22

PETITION FOR WRIT OF CERTIORARI

Petitioners, Allen Breaux and Joe Ambrogio, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 205 F.3d 150 (5th Cir. 2000). *See* Appendix, at 1. The judgment of the United States District Court for the Northern District of Texas is unreported. *See* App., at 33.

JURISDICTION

The judgment of the Fifth Circuit was entered on February 23, 2000. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution. It also involves 42 U.S.C. § 1983. The texts of these provisions appear in the Appendix, at 38.

STATEMENT OF THE CASE

(a) Statement of Facts

In the fall of 1992, Defendant Terry Hensley, who was then the Chief of Police for the City of Garland, Texas, initiated an investigation into the activities of several Garland City Councilmembers. (Record, Volume 21, at 181-83). Although the FBI was substantially involved in the matter, Hensley oversaw the investigation, telling the FBI agents which councilmembers and which of their activities to investigate. (21:183; 22:192). Garland's City

Manager, Defendant Ron Holifield, also played a significant role in the investigation, acting as a "confidential informant" to the FBI. (21:200-01). The investigation continued for more than two years but never led to any indictments. (21:221; 22:26, 181-82, 259, 268).

The councilmembers whom Hensley had investigated were politically aligned and included several political enemies of Hensley and Holifield. (21:183-85, 215-16; 22:24; Plaintiff's Exhibit 1 ("PX 1")). Hensley feared that he and Holifield would lose their jobs if one of their political enemies became the mayor. (23:41). From the beginning, the Garland police officers assigned to the investigation had doubts about whether it was properly motivated. (21:186-87, 190-91, 196-98, 201, 214, 216-17; 22:182-83). Commander Larry Wilson "didn't see any probable cause" for the investigation, and concluded that it "was initiated for the wrong reasons." (21:190; 22:28). In addition to Wilson, Lt. Jody Lay and Officer Joe Harn were concerned that the investigation was politically motivated. (21:213-14; 22:24).

In August 1992, Lt. Lay became the Supervisor of the Intelligence Unit. (25:114-15; 21:192-93). In that capacity, and at Hensley's direction, Lay acted as the leader of the political investigation into city councilmembers and served as liaison to the FBI. (21:192-93; 21:196). A few weeks after Lay assumed control of the Intelligence Unit, he took Plaintiff Allen Breaux for a truck ride. (25:128; 21:181; 25:126). Officer Breaux was a 19-year veteran of the Garland Police Department and had worked in the Intelligence Unit since the mid-1980s. (25:121-23). His supervisors regularly evaluated his performance as "outstanding." (21:164-175; PX 33,34). During the truck ride, Lay explained that the Intelligence Unit was going "to start doing political investigations" for Hensley and others. (25:129). Lay attempted to recruit Breaux for those investigations, but Breaux refused to participate in what he considered to be illegal investigations, and requested a transfer back to patrol. (25:128-31). When Hensley became aware of Breaux's principled opposition to

Hensley's political shenanigans, Hensley confronted Breaux, threw transfer papers in Breaux's face, and yelled, "So you don't want to be part of my Intelligence Unit, then get your ass out of my office." (25:133; 26:35-36). Hensley transferred Breaux to the worst shift on patrol, deep nights. (25:133; 22:134).

For the next year and a half, Breaux worked as a patrol officer and did not hear anything more about the political investigations. (25:135). Nor did he inquire about them due to fear he would be fired. (25:134). In January 1994, however, Breaux was elected vice-president of the Garland Police Officers' Association ("GPOA"). (DX 35, Response 1; DX 38, Response 1). Breaux then confided in the newly elected President of the GPOA, Detective Joe Ambrogio, that Lay had attempted to recruit him to participate in political investigations. (24:138).

By the Spring of 1994, police department morale was extremely low, (21:201-02), and the GPOA decided to conduct a survey of all department employees in an effort to identify problems and recommend solutions. (25:139). The GPOA intended to present the information to Hensley and hoped that he would work with them. (25:139). When Hensley learned about the survey, however, he became very angry, summoned Ambrogio to his office, and made vulgar, abusive remarks. (24:135, 142; 21:202; 22:56-57). When Ambrogio tried to leave, Hensley blocked his exit and threatened to fire Ambrogio if the survey hurt or embarrassed Hensley. (23:24; 24:156-57).

Holifield was also displeased with the survey. (22:56). On March 9, 1994, the day after Hensley's confrontation with Ambrogio, Holifield ordered every officer on the GPOA board to report to his office. (21:202; 24:136). Holifield criticized the GPOA and threatened to "destroy" it if it acted politically, (25:143; 24:141), claiming that he wanted to keep politics out of the Department. (24:137; 25:144). Reacting to the discussion about keeping politics out of the Department, Breaux informed Holifield that Lay had tried to recruit him to conduct political investigations. (21:203; 24:137; DX 210, at 13-14). After

Breaux raised the issue of political investigations, Holifield jumped to his feet, shut his office door, and told the officers he "wanted the topic of political investigations to remain confidential." (24:140; 25:143). Then, immediately after the March 9 meeting, Holifield alerted Hensley that Breaux was talking about the political investigations. (23:25). From that point on, Breaux (and later, Ambrogio) became the target of intense retaliation orchestrated by Hensley and Holifield. (21:203; 25:162-63; 26:23-24).

The Retaliation – After being informed by Holifield that Breaux had reported the political investigations during the March 9 meeting, Hensley filed an Internal Affairs charge (#94-12) against Breaux, accusing him of making false statements while conducting city business. (23:29-30; PX 57). On April 18, 1994, Holifield filed a second Internal Affairs charge (#94-13), accusing Breaux, Ambrogio, and the other GPOA board members of stealing film from a hidden video camera in Holifield's office. (23:35-37; 25:146; PX 65, 66, 67; DX 29, 2). The alleged "theft" came to Holifield's attention on March 28, during a meeting with Hensley and others in Holifield's office. The officer responsible for changing the film in Holifield's camera came in to check the film and found the camera empty. (23:38-39; 26:76-77). Holifield noted that the GPOA board members had been in his office during the meeting on March 9, and decided to formally accuse them of theft. (26:78). No other evidence linked the GPOA board members to the "theft," and no evidence suggested that there had even been a theft (as opposed to a simple failure to put film in the camera). (23:220-21). Nevertheless, the GPOA board members were not only formally accused of theft, they were placed under a gag order. (23:35-37; 25:146; PX 29, 65, 66, 67; DX 2).

The Internal Affairs investigation of the charges was overtly one-sided. The investigation of Charge 94-12, which accused Breaux of lying to Holifield about Lt. Lay recruiting Breaux to do political investigations, consisted of repeated interrogations of Breaux, who was also

required to submit several written statements. (23:31-32; PX 58, 59, 60, 62, 79, 138, 139, 140). Meanwhile, Lt. Lay was never even interviewed. (23:33-34; DX 1). As to Charge 94-13, the "trumped up" theft charge, all of the GPOA board members were required to give written statements and oral interviews. (25:149; PX 68-72, 80, 144-45; DX 2, Atts. 7,10,13,16,17,20,23,26,29,32,33; DX 64-66, 76). Although many other persons had been in Holifield's office during the relevant period, nobody was investigated for stealing the film except the GPOA board members. (24:33; 23:235-37, 239; 21:212-13).

The investigation uncovered no evidence that *any* police officer had stolen film from Holifield's camera (23:220-21), and Lay wondered whether any film was even missing, or whether the officer responsible had simply forgotten to load the camera. (22:184; 23:37-38). Moreover, Hensley admitted that, at the time the theft charge was filed, no evidence indicated that any police officer had stolen the film. (23:220-21). The primary motivation for pursuing these "trumped up" charges was Defendants' anger about the GPOA survey and their continued sensitivity about Breaux's allegations of corruption. (21:207; 22:189; 23:232-33). Commander Wilson put it succinctly: "[T]hat allegation was made to keep them [Breaux and Ambrogio] quiet." (21:209).

After being accused of theft in Charge 94-13, Ambrogio contacted CLEAT (Combined Law Enforcement Associations of Texas) and requested an attorney. (25:100-01; 24:143; 25:136). The attorney, Bob Hasty, advised Ambrogio to issue a press release, call a press conference, and demand an outside investigation. Ambrogio followed Hasty's advice. (24:143, 145). The press release, which was issued jointly by the GPOA and CLEAT, called for an independent investigation into "public corruption within the police department." (24:169; DX 123). At the press conference, both Hasty and Ambrogio requested an independent inquiry to determine whether the Department

contained a secret intelligence unit that investigated persons "who oppose this current administration." (23:150-51; 24:146).

After the press conference, Hensley brought yet another Internal Affairs Charge against Ambrogio (#94-14), (24:146-47; DX 3, Att. 3), accusing him of "conduct resulting in justified [sic], unfavorable criticism of the Department," conduct that would "embarrass, humiliate or shame another," and "insubordination." (DX 75). Once again, Ambrogio was subjected to numerous interrogations and was required to give several statements. (PX 76-77, 80-82, 144-45).

At the conclusion of the Internal Affairs hearings on the charges against the Plaintiffs, Hensley sustained Charge 94-12 against Breaux and Charge 94-14 against Ambrogio. (21:207; PX 140, p. 080130; PX 145, p. 090223-25; DX 73). Hensley suspended Breaux, ordered him to surrender his gun and badge, and placed him on administrative leave. (25:154-55; 23:209; PX 5, p.3; PX 140, p.39). Hensley also imposed an unprecedented continuing gag order on Breaux and Ambrogio, and threatened them with additional charges of insubordination if they discussed their side of the events with anyone. (23:44-45, 217-18).

In a further effort to destroy Breaux's credibility, Hensley ordered him to undergo a mental stability evaluation. (25:155-56; PX 87). Breaux was subjected to three and one-half days of evaluation by a psychologist. (25:156). The psychologist found that, although Breaux was suffering from "situationally-related stress" at work, his thinking was "free of distortions in perception," and he was "capable of appropriate judgment" and "fit for duty." (25:156; PX 89, p.2). Despite widespread knowledge within the Department that Hensley had ordered this exam, Hensley made no effort to publicize the favorable result.

To further penalize Breaux, Hensley publicly reprimanded him by posting a memorandum throughout the Department attacking Breaux's character, credibility, and competence. (23:46-47, 49-55, 57-59, 84; PX 5). The memorandum, which Hensley issued under his signature, stated that Breaux was guilty of "making false and irresponsible statements," and concluded, "Officer Breaux's allegations are completely without basis in fact." (23:46-47, 49-50; PX 5). The patrol display board, one of the places Hensley posted the memorandum, became known among the officers as the "Wall of Shame." (25:157-58). Hensley made the memorandum available to the press and told reporters that Breaux lied in his report of suspected misconduct. (23:60, 64). The lead story in the Garland Section of the DALLAS MORNING NEWS on May 6, 1994 bore the headline "Police Chief Says Officer Lied," and the article specifically named Allen Breaux. (DX 1, pp. 080203-04). Although reporters telephoned Breaux, Hensley's gag order prevented Breaux from defending himself. (25:157).

In May 1994, Hensley also posted on the "Wall of Shame" a memorandum addressed to all Department personnel announcing that he had sustained various charges against Ambrogio arising from the press conference. (23:58-59; PX 7). The memo stated that Ambrogio was guilty of making "numerous false allegations" and that "Ambrogio had no evidence to support the allegations." Hensley also told a reporter from the DALLAS MORNING NEWS that Ambrogio's statements were lies. (23:64). Ambrogio felt that he was "at the end of [his] rope," and that he would be fired at any moment because of the trumped up investigations. (22:28, 24:162, 172). When he walked down the hall, people ducked into rooms to avoid him like he "had the plague." (24:154). Fellow officers on the SWAT team, with whom he worked in life-and-death situations, now had doubts about him. (24:150).

Finally, in mid-May 1994, Hensley attempted to pressure the Plaintiffs into recanting their reports of Hensley's politically motivated investigations. Hensley

drafted an apology letter for Breaux's signature, then called Breaux into his office and pressured him to sign it. (23:62-64; 25:175; PX 6). The letter stated, "I now know there was no evidence for any of the allegations I made," and required Breaux to admit that he had raised concerns about the political investigations because of emotional problems resulting from his service in Vietnam. (23:62-64; PX 6). Hensley told Breaux that, by signing the letter, Breaux would avoid termination and could retire early with full benefits. (23:75-76, 78-79; PX 6). Hensley also attempted to persuade Ambrogio to sign a similar apology letter, in which Hensley tried to make Ambrogio admit that he "made serious mistakes and misjudgments," that "none of the accusations [about the political investigations] were true," that he made those accusations to "make Chief Hensley and Lieutenant Lay look bad," and that he was "guilty of all the things that the Chain of Command Board said I did." (23:65-72; PX 8). Hensley told Ambrogio that if he would sign the letter and accept a 20-day suspension, he could save his job. (23:75-76, 186-87; PX 145, at 090223-24). Hensley also warned Ambrogio that if he did not sign the letter, "all things were possible, including indefinite suspension," which is the same as termination. (23:84, 187). Despite these threats, both Breaux and Ambrogio stood by their principles and refused to sign the letters. (24:161-62; 25:175). Hensley assuredly would have fired both officers had he not been replaced as Police Chief in early June 1994, following the election of a new mayor.[1]

This entire ordeal of false charges, one-sided investigations, repeated interrogations, hearings with foregone

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[1] Although Breaux and Ambrogio narrowly avoided termination, the retaliation orchestrated by Hensley continued to adversely affect their careers. Hensley effectively had turned the officers into "pariahs" with little hope of career advancement. Indeed, Hensley's successor – an ally of Hensley – transferred Breaux to the Telephone Reporting Unit, a desk job staffed principally with civilians. (22:40; 25:178).

conclusions, suspensions, gag orders, mental instability exams, public reprimands, defamatory publicity, and threats to terminate unless the officers recanted in writing, was, in the view of Commander Wilson, "done to stop the accusations that were being made" by Plaintiffs. (21:207). According to Wilson, "this was Terry Hensley's way of fighting back." (21:207). Garland's Mayor, James Ratliff, who conducted his own inquiry into these matters after he took office in May 1994, concluded that "Officer Breaux and Detective Ambrogio were wronged by the Garland Police Department." (22:77). Mayor Ratliff's handwritten notes reveal that he was "outraged that a number of senior officers in the Garland Police Department were prepared to allow two innocent officers to take a fall for making public what appeared to be an illegal investigation . . . [I]nstead of condemnation, they should be getting a public apology and thanks." (22:66).

(b) Course of Proceedings and Dispositions

As a result of this series of retaliatory actions, Breaux and Ambrogio filed suit against Hensley, Holifield, and the City of Garland, in the Northern District of Texas, Dallas Division, alleging violations of 42 U.S.C. § 1983.[2] Federal jurisdiction over this lawsuit was premised on 28 U.S.C. § 1331. Following trial, the jury found Hensley and Holifield individually liable under § 1983 and ordered them to pay actual damages in excess of $500,000, and further ordered each of them to pay $5,000,000 in punitive damages to each Plaintiff. (15:1762-65). The court entered judgment on the verdict but, in responding to various post-judgment motions, reduced the actual damages, proportionally reduced the punitive damages, and

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[2] The district court granted the City summary judgment on the § 1983 claim on the ground that neither Hensley nor Holifield possessed "final policy-making authority" for the City regarding the matter of police officer employment decisions. (14:1556-69).

required a remittitur from the Plaintiffs. (20:2152-77). After accepting the remittitur, Breaux and Ambrogio were awarded, jointly and severally from the Defendants, $6,258.75 and $2,256 respectively for lost income, and severally from each Defendant, $150,000 for lost reputation, $50,000 for mental anguish, and $2,000,000 as punitive damages. (20:2183-87).

The Fifth Circuit reversed the District Court's judgment on the ground that the retaliation suffered by the Plaintiffs was not sufficiently severe to inflict a constitutional injury. App. 14-22. According to the Fifth Circuit, Hensley and Holifield's vendetta against Breaux and Ambrogio did not rise to the level of an "adverse employment action." App. 22. Explaining that federal courts should not become enmeshed in "relatively trivial matters," the Fifth Circuit declined to view governmental retaliation as actionable just because it has the effect of chilling the exercise of free speech. App. 15. Readily apparent from the court's discussion is its conviction that some forms of governmental retaliation against public employee speech are "relatively trivial" despite their success in achieving an inhibiting and chilling effect on the free exercise of First Amendment rights. *See id.* Focusing more on the *form* of retaliation than the substantive *effect* of the retaliation, the Fifth Circuit set down a short, relatively inflexible list of actionable adverse employment actions, consisting of discharges, refusals to hire, demotions, refusals to promote, reprimands, and transfers that effectively amount to demotions. *See* App. 14-15. Then, instead of assessing the overall punitive and chilling effect of the totality of the retaliatory actions aimed at Breaux and Ambrogio, the Fifth Circuit examined each action in isolation, mechanically concluding that none of the various forms of retaliation was on the Fifth Circuit's short list of actionable adverse employment actions. *See* App. 15-21.

Specifically, the panel in *Breaux* ruled that the false charges were not an "adverse employment action" amounting to a constitutional deprivation because Fifth

Circuit precedent indicated that false charges are not on the Fifth Circuit's short list of adverse employment actions. App. 15-16. The one-sided investigations, including repeated interrogations of Breaux and Ambrogio, were not "adverse employment actions" because investigations are not on the Fifth Circuit list. *Id.* The ordering of Breaux to undergo a mental instability exam was deemed insufficiently adverse because psychological testing is not on the list. *See id.* The suspension of Breaux and the defamatory public reprimands of both Breaux and Ambrogio gave the panel a bit more pause, because "reprimands" *are* included on the Fifth Circuit's list of actionable "adverse employment actions." App. 15-17. Nevertheless, the panel characterized the suspension as mere "administrative leave" that resulted in no loss of pay. App. 16. The official reprimands that went on Breaux and Ambrogio's permanent records ceased to be actionable "reprimands" because they were subsequently "rescinded" by a later Police Chief. App. 17.[3] As to the reputational damage that the jury found was caused by Hensley's wide publication of the false charges and reprimands, the panel explained that reputational damage cannot be an "adverse employment action," App. 17-18 n.14, relying inappropriately on *Paul v. Davis*, 424 U.S. 693 (1976).[4] As to the threats of termination unless Breaux

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[3] Because of the Fifth Circuit's mechanical approach to the "adverse employment action" issue, it did not address the punitive and chilling impact that the reprimands had on speech during the time before those reprimands were rescinded. Nor did it address how a public reprimand can be effectively "rescinded" when the rescinding is done quietly and without any attendant publicity, either in the Department or in the media.

[4] *Paul v. Davis* held only that injury to reputation alone does not deprive an individual of a "liberty" or "property" interest under due process analysis. 424 U.S. at 712. The First Amendment, by contrast, as this Court has consistently ruled since *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), can be

and Ambrogio recanted their speech, the Fifth Circuit ruled that threats of dismissal are simply "hot air" that is incapable of chilling constitutional rights because employees should know that *Pickering v. Board of Education*, 391 U.S. 563 (1968), permits them to bring a lawsuit should they actually *be* terminated. App. 19-20.[5] Finally, the panel explained that the totality of Defendant's campaign of retaliatory harassment was not actionable because it did not amount to a *constructive* adverse employment action, essentially because Ambrogio and Breaux were neither fired nor effectively "demoted." App. 21-22.

In sum, even though the Fifth Circuit acknowledged that the jury could reasonably find that Defendants undertook their adverse actions *because of* Plaintiffs' truthful speech on a matter of public concern, App. 13, 14 n.11, and further that there was no legitimate workplace justification for the actions sufficient to outweigh Plaintiffs' speech interests, App. 13 & n.10, the Plaintiffs' lawsuit was ruled fatally devoid of an "adverse employment action" because they had not technically suffered discharge, demotion, denial of promotion, reduction in pay, or lost seniority as a result of their speech. App. 14, 22. The court found no other reversible error. *See* App. 2, 11 n.8, 32.

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violated by retaliatory governmental actions that deprive public employees of benefits that are not themselves of constitutional magnitude, so long as the damage was inflicted *because of* employees' exercise of First Amendment rights.

[5] The Fifth Circuit explained that *Pickering* involved an *actual* termination, and that this Court's crucial references in *Pickering* to *threats* of termination were really addressing a pre-*Pickering* era. App. 20. According to the Fifth Circuit, public employees threatened with termination after *Pickering* should be comforted that such threats cannot be backed up, and should feel free to continue their First Amendment activity, confident in the knowledge that they can file a lawsuit if they get fired. *Id.*

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Analysis of "Adverse Employment Action" in *Breaux* Stands in Direct Contravention of this Court's Settled View That Public Employees Suffer Actionable First Amendment Injury When Governmental Retaliation – No Matter What Mode of Retaliatory Weapon the Government Selects – is Sufficiently Severe to Penalize and Inhibit Their Exercise of First Amendment Rights.

At the very heart of the First Amendment is the principle that the government may not prohibit or penalize speech that is critical of how governmental power is exercised. *See Texas v. Johnson*, 491 U.S. 397, 414-20 (1989); *Houston v. Hill*, 482 U.S. 451, 462-63 (1987). In a democratic society, where the people decide who to put in power and thereby act as a check on abuses of that power, it is essential that the people be permitted to engage in a robust exchange of ideas in order to promote more informed self-government. *See Connick v. Myers*, 461 U.S. 138, 145 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 571-72 (1968). Indeed, the Court considers these core First Amendment ideals so paramount that – in sharp contrast to any other constitutional guarantee – even individuals who have suffered no cognizable First Amendment injury are given standing to challenge a statutory prohibition on the ground that it threatens to penalize and thereby "chill" the First Amendment rights of others. *See Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972); *Broadrick v. Oklahoma*, 413 U.S. 601, 610-13 (1973). The Court has consistently justified such "special treatment" on the ground that substantial damage to First Amendment values is caused by the mere threat of punishment (as long as it is a realistic threat) and, consequently, has treated the "chilling effect" of potential governmental punishment to be the hallmark of First Amendment "injury." *Gooding*, 405 U.S. at 521; *Broadrick*, 413 U.S. at 612-13.

Although the "chilling effect" condemned by the Court typically arises from the punitive actions of government *as sovereign*, the Court has similarly condemned punitive governmental activity – even when pursued in its role *as employer* rather than sovereign – that inhibits, or "chills," the exercise of core First Amendment activity by public employees. *See, e.g., Pickering*, 391 U.S. at 572-74; *Connick*, 461 U.S. at 145. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), the Court rejected the notion that the government, acting in its role as employer, can accomplish indirectly, by denying benefits to its employees, what it cannot command directly when acting in its role as sovereign. Thus, even though a public employee may not have a right to a particular job benefit, there are some bases upon which the government may not deny the employee that benefit. *See id.* Under *Perry*, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech." *Id.*

The rationale for the Court's holding in *Perry* is the very same "chilling" concern that has consistently informed the Court's First Amendment jurisprudence: "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, *his exercise of those freedoms would in effect be penalized and inhibited.*" *Id.* (emphasis added). Moreover, because governmental employees are often in the best position to detect governmental abuses, inefficiency, or waste, the Court has emphasized that such individuals must be able to speak freely on matters of public concern. *See Pickering*, 391 U.S. at 572; *Board of Commissioners v. Umbehr*, 511 U.S. 668, 674 (1995); *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality). Thus, governmental retaliation that is sufficiently severe to inhibit or "chill" public employees' speech on matters of public concern – whether the retaliation specifically deters the target of the retaliation or generally deters other employees from speaking on matters of public concern – is of paramount

First Amendment significance. *See Pickering*, 391 U.S. at 572-74; *Umbehr*, 518 U.S. at 674.

The only material difference in how the Court has treated speech restrictions imposed by the government in its role as employer and speech restrictions imposed by the government in its role as sovereign is that the government can more readily *justify* restrictions on the First Amendment rights of its employees, at least where an employee's First Amendment activities truly undermine his ability to perform his particular job effectively and efficiently. *See Pickering*, 391 U.S. at 568. Thus, the Court explained in *Pickering* that "[The] State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in [regulating] the speech of the citizenry in general." *Id. Pickering* therefore instructs courts to "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* Notably, there is no suggestion in *Pickering* – or any other of the Court's precedents – that the threshold for establishing an *injury* of First Amendment magnitude is *higher* for a public employee than for any other citizen. Indeed, the *Pickering* balance suggests otherwise – that the only "break" the government receives when acting as employer is that it has readier means to justify an infringement of public employees' First Amendment interests.

Viewed in light of these core First Amendment doctrines, the damage done to the First Amendment by the Fifth Circuit's ruling in *Breaux* is immense. The severity of the retaliation against Officer Breaux and Detective Ambrogio was certainly sufficient to penalize and inhibit their criticism of what reasonably appeared to be a blatant misuse of governmental power, and was additionally sufficient to muffle the voices of other officers in the Garland Police Department, who "got the message" that there would be a stiff price to pay for expressing concern

about Chief Hensley's use of the department to investigate his political enemies. Moreover, the retaliatory and punitive actions taken by Hensley and Holifield were pursued with the very *purpose* of penalizing, and thereby inhibiting, speech on a matter of vital public concern.

The Fifth Circuit's analysis confuses the *cause* of the injury with the actual First Amendment *injury*. An adverse employment action might *cause* a First Amendment injury; but it cannot *be* the First Amendment injury, because there is no First Amendment right to public employment or to any particular condition or benefit of employment. The First Amendment rights of public employees are not infringed unless the government undertakes adverse employment actions *because of* employees' speech on matters of public concern. *See Perry*, 408 U.S. at 596-98. It is only when public employees suffer adverse actions *because of* First Amendment activity that their First Amendment rights are unconstitutionally penalized and inhibited. *See id.* at 597. Thus, it is the punitive and inhibiting *effect* of the government's retaliation – and not any particular *mode* of retaliation – that constitutes the essence of the injury and that, without which, there would be no First Amendment claim. The Fifth Circuit's decision, however, elevates form over substance by inappropriately focusing on the *mode* of retaliation selected by the governmental employer rather than on the purpose and effect of that retaliation.

This focus leads to an untenable result that runs dramatically counter to this Court's First Amendment jurisprudence: A governmental employer may purposefully retaliate against a public employee's speech on matters of public concern, without any legitimate justification, effectively punishing and thereby inhibiting that employee's speech, as well as sending a "chilling" message to other employees, as long as the government carefully chooses its retaliatory weapons from among those the Fifth Circuit has expressly approved. Indeed, public entities desiring to retaliate against employees because of

those employees' exercise of speech or associational rights need only refer to the Fifth Circuit's *Breaux* opinion for a blueprint on how to engage in ill-motivated and unjustifiable retaliation without incurring any liability. With *Breaux* as a guide, governmental agencies can deliberately penalize, inhibit, and chill public employees' speech on matters of public concern, and can do so with impunity.

In *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73, 79 (1990), the Court clearly established that the key to a public employee's First Amendment retaliation claim is not the *form* of the retaliation but rather its *effect* – *i.e.*, whether the retaliatory actions "chill the exercise of protected [activities] by public employees" or "pressur[e] employees to discontinue the free exercise of their First Amendment rights." Although *Rutan* was a patronage case in which employees were being penalized for their political beliefs and associations rather than for their speech on matters of public concern, *Rutan*'s reasoning is equally applicable to governmental retaliation against employee speech – particularly with respect to the issue of how severe the retaliation must be before First Amendment injury is inflicted.[6] The Seventh Circuit in *Rutan* had ruled that only those retaliatory employment decisions that are the "substantial equivalent of dismissal" can violate a public employee's First Amendment rights. 497 U.S. at 75 (citing 868 F.2d at 954-57). This Court rejected the Seventh Circuit's formulation precisely because – as in the present case – it arbitrarily focused on the *form* of governmental retaliation rather than on whether the

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[6] If anything, the threshold of severity should be higher in the "patronage" context than in the "speech" context, given that adverse employment activity motivated by patronage arguably *serves* First Amendment ideals by facilitating elected officials' ability to carry out the policies favored by the electorate. *See Elrod v. Burns*, 427 U.S. 347, 367, 371-72 (1976). Thus, in patronage cases, there are countervailing First Amendment-related interests on the government's side of the balance.

retaliation, of whatever form, was sufficient to produce the constitutionally proscribed chilling and inhibiting effect. *See Rutan*, 497 U.S. at 75. Accordingly, the *Rutan* Court explained: "We find [the Seventh Circuit's] test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy." *Id.* The Court further emphasized that the critical question "is not which penalty is more acute, but whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights." *Id.* at 79.

The Fifth Circuit's decision in *Breaux* is utterly at odds with *Rutan*. The question is *whether* the governmental retaliation produced an environment antithetical to the free exercise of First Amendment rights, not *how* the government produced that environment. Throughout the *Rutan* opinion, this Court repeatedly described the First Amendment injury in reference to the effect the retaliation would have on public employees' ability to exercise their rights rather than on the form or mode of the retaliation itself. 497 U.S. at 69-79. Thus, the Court acknowledged the First Amendment significance of retaliatory employment actions that "chill," "burden," "inhibit," "constrain," "encroach on," "interfere with," "infringe" or "impede" public employees' exercise of First Amendment freedoms, as well as those retaliatory actions that "pressure," "coerce," "obligate," or "press" public employees to discontinue exercising those rights. *Id.* at 69, 70, 73, 74, 75, 76, 77, 79.

Rutan's emphasis on the chilling effect of governmental retaliation, rather than on the *means* chosen to accomplish that effect, makes perfect sense given that public employees are always required to prove that the adverse employment actions were undertaken with the motive of retaliating against the employee because of the employee's exercise of First Amendment rights. *See Umbehr*, 518 U.S. at 675. If the *purpose* of the adverse

employment action is to retaliate against, and thereby penalize and inhibit, the exercise of First Amendment rights – and if the retaliation has that *effect* – it makes no sense to require that the employee additionally establish that the government produced this First Amendment damage by some particular *means*. The clever choice of means cannot justify the end. But under the Fifth Circuit's approach, as long as the government chooses its weapons from that court's list of approved tactics, it may freely retaliate with the overt purpose of chilling speech on matters of public concern, and may successfully effectuate its impermissible objectives with impunity.

Significantly, this Court in *Rutan* condemned even the least harsh of the challenged employment actions – the denial of promotions, and the denial of one employee's request for a transfer so he could work closer to home. *Id.* at 67, 73. According to the Court, "Employees who find themselves in dead-end positions due to their political background *are* adversely affected." *Id.* at 73 (emphasis in original). Additionally, "[e]mployees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so." *Id.* The Court concluded, "[t]hese are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment." *Id.* at 74. Indeed, *Rutan* further noted that the First Amendment protects public employees from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." *Id.* at 76 n.8 (quoting 868 F.2d at 954 n.4).

More recently, in *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 457 (1995), the Court held that § 501(b) of the Ethics in Government Act, which prohibits certain governmental employees from accepting an honorarium for making speeches or writing articles, constitutes an unconstitutional infringement on public

employees' expressive activities. Even though the honoraria ban did not prevent public employees from writing or speaking, and even though it affected employees only when they were engaged in activities outside the workplace, the Court nevertheless characterized the ban as a "significant burden on expressive activity" because it denied the covered employees an "incentive toward more expression." *Id.* at 468-69. When the government was unable to justify the inhibiting effect of the honoraria ban on public employee speech, such as by pointing to overriding governmental workplace needs, the Court declared the ban unconstitutional. *See id.* at 470, 477.

The governmental retaliation in the present case penalized and inhibited speech far more than the long commute in *Rutan* or the honoraria ban in *Treasury Employees*. Breaux and Ambrogio were the targets of a continuing campaign of retaliatory harassment orchestrated by their superiors, which included: 1) trumped up Internal Affairs charges, usually filed on the "spur of the moment" while in immediate anger about Plaintiffs' accusations of abuse of power, rather than as the result of any reflective, deliberative process; 2) one-sided investigations of those charges, marked by repeated interrogations of the Plaintiffs and the failure even to interview others whose information was obviously relevant, and in the case of the film "theft," the refusal to investigate other possible suspects; 3) gag orders that not only prohibited Plaintiffs from telling their side of the events during the "investigation" of the Internal Affairs charges, but which continued even after the adjudication of those charges; 4) "Kangaroo court" hearings with Hensley in the role of ultimate fact-finder and sentencer; 5) the suspension of Breaux as a result of Hensley sustaining the charges; 6) the requirement that Breaux undergo mental stability testing; 7) defamatory public reprimands of both Breaux and Ambrogio, posted on the Department's "Wall of Shame," and disseminated to the press; and 8) threats to

terminate the Plaintiffs unless they signed false confessions composed by Hensley in the form of apology letters. Although it may be possible to conceive of additional ways that Breaux and Ambrogio's superiors could have retaliated against them, perhaps even ways of still increasing severity, the retaliatory weapons chosen by the Defendants were certainly sufficiently punitive and chilling to support a First Amendment claim under this Court's precedent.[7]

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[7] That retaliation is sufficiently severe to support a First Amendment cause of action does not mean that the degree of retaliatory severity is never of further consequence. Quite to the contrary, there are a number of ways that relatively less severe forms of retaliation remain relevant in this Court's analytical framework for resolving First Amendment claims of public employees. This framework is set forth in *Umbehr*. 518 U.S. at 675-76. *First*, because the First Amendment's guarantee of freedom of speech protects governmental employees only from adverse actions taken *because of* their speech on matters of public concern, the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct. *See id.* at 675. The severity of the adverse employment action is plainly relevant to this inquiry: the more routine the adverse action, the less likely it is to be viewed as "retaliatory." *Second*, even when the government has taken an adverse action *because of* protected speech, the adverse action may be justified by pointing to countervailing governmental interests that are sufficiently strong to outweigh the employee's free speech interests. *See id.* at 675-76 (citing *Pickering*, 391 U.S. at 568). Under this "balancing," relatively minor adverse actions will be more easily justified as impinging on employee speech only as much as necessary to serve legitimate workplace needs. And *third*, if the employee ultimately establishes that the employer has violated his First Amendment rights, the lack of severity of the adverse employment action is relevant to the amount of both compensatory and punitive damages.

In sum, the existing legal framework for adjudicating public employee First Amendment claims already factors in – at every step of the analysis – the relative severity of adverse

II. The Fifth Circuit's Analysis in *Breaux* Reflects a Split in the Circuits, the Majority of Which Determine the First Amendment Significance of Governmental Retaliation According to an Objective "Chilling" Standard.

The circuits have taken several divergent approaches to the issue of whether governmental retaliation aimed at public employees' exercise of First Amendment freedoms is sufficiently severe to be actionable. There have been essentially four different approaches, listed here in increasing degrees of severity:

1. The wide open "any discipline" approach;
2. The "objectively chilling" standard;
3. The restrictive short list of actionable employment actions approach; and
4. The "substantial equivalent of dismissal" test.

"Any discipline": Under this nonrestrictive approach, even an employee who suffers relatively minor adversity has a claim as long as the adversity was applied in retaliation for the employee's exercise of First Amendment freedoms. *See, e.g., Lieberman v. Reisman*, 857 F.2d 896, 900 (2nd Cir. 1988) ("[W]henever under color of state law unfavorable action is taken against a person on account of that person's political activities or affiliation, it raises First Amendment concerns."); *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir. 1987) ("[T]he constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech."); *Waters v. Chaffin*, 684 F.2d 833, 837 n.9 (11th Cir. 1982) ("The First Amendment is implicated whenever a government employee is disciplined for his speech.").

The "Objectively Chilling" Standard: Under this approach, a public employee who suffers governmental retaliation for the exercise of First Amendment rights has a

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employment actions. Consequently, the Fifth Circuit's "all or nothing" approach serves no necessary function, and will prevent many deserving public employees from having their day in court.

claim as long as the retaliation would be sufficient to deter (or chill) a person of ordinary firmness from continuing to engage in First Amendment activity. *See, e.g., Agosto de Feliciano v. Aponte Roque*, 889 F.2d 1209, 1217 (1st Cir. 1989) (recognizing, in a patronage case, that a cause of action exists "where the government's actions are sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations in favor of the prevailing party"); *Suppan v. Dadonna*, 203 F.3d 228, 235 (3rd Cir. 2000) (relief appropriate when retaliation is "sufficient 'to deter a person of ordinary firmness' from exercising his First Amendment rights."); *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998) (plaintiff must establish "that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in [constitutionally protected] activity"); *Piecynski v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989) ("Harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs."); *Allen v. Scribner*, 812 F.2d 426, 434 n.16 (9th Cir. 1987) (plaintiff's reassignment "might have had an impermissible chilling effect on his constitutionally protected speech") & n.17 ("While the individual incidents of verbal intimidation and abuse may seem insubstantial, we cannot say as a matter of law that the exercise of First Amendment rights was not deterred."); *Goffer v. Marbury*, 956 F.2d 1045, 1049 n.1 (11th Cir. 1992) (The First Amendment protects against "any adverse employment action taken by the employer that is likely to chill the exercise of constitutionally protected speech"); *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994) (approving of and applying a "likely to chill" standard).

The Restrictive Short List of Actionable Employment Actions Approach: The Fifth Circuit's approach, as evidenced by its application in *Breaux*, is somewhat difficult to label. On one hand, it appears to be a case-by-case

assessment of the severity of the retaliation at issue, similar in that regard to the approach of those circuits using the "objectively chilling" test. But *Breaux* makes clear that the propensity of the retaliation to deter or chill speech is not by itself sufficient to support a First Amendment claim in the Fifth Circuit. App. 15. It is at this point that the Fifth Circuit's approach begins to operate more like a *per se* rule, restricting actionable retaliation to a short list of the most severe forms of adverse employment actions – discharge, demotion, failure to promote, official reprimand (but only if the reprimand is never rescinded), and transfer (but only if the transfer is a constructive demotion). *See* App. 14-16, 22.[8]

The Substantial Equivalent of Dismissal Test: Under this approach, public employees have a cause of action only if they are actually or constructively discharged. *See, e.g., Delong v. United States*, 621 F.2d 618, 623-24 (4th Cir. 1980).

Of these four approaches, only two are viable in light of this Court's opinion in *Rutan*. After *Rutan* rejected the Seventh Circuit's use of the "substantial equivalent of dismissal" test in a patronage case, the Fourth Circuit understandably construed *Rutan* as foreclosing its use in any case involving governmental retaliation against public employees' exercise of First Amendment activities. *See DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995). Since *Rutan*, the Fourth Circuit has been moving in the direction of the "objectively chilling" standard. *See ACLU v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993). Moreover, *Rutan*'s approach to the requisite severity of an adverse employment action, as well as its reasoning, is squarely at odds with the Fifth Circuit's rigid and restrictive "short list" of actionable employment actions. As explained in more detail in Argument I of this Petition, the Fifth Circuit

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[8] Essentially, by interpreting "adverse employment action" as if it were a statutory term of art, with a particularized, narrow, and rigid meaning, the Fifth Circuit has imposed a "Title VII-like" requirement on First Amendment litigants.

approach elevates the *form* of the retaliation over *Rutan*'s emphasis on the substantive effect the retaliation has on the free exercise of First Amendment freedoms.

Only the two least restrictive tests – the "any discipline" approach and the "objectively chilling" standard – can claim to be consistent with *Rutan*. And only these two least restrictive tests permit a cause of action every time there is significant damage done to First Amendment values. Although the "any discipline" approach establishes no severity threshold, this approach finds support in the "birthday party illustration" in footnote 8 of *Rutan*. *See* 497 U.S. at 76 n.8 (noting that the First Amendment protects employees from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.") Moreover, as explained in footnote 7 of this Petition, there are several stages of the *Pickering* analysis where employers can successfully avoid paying heavy damages, or avoid liability altogether, by pointing to the relative triviality of the adverse action(s) that provoked the lawsuit. These existing hurdles to any substantial recovery for minor forms of retaliation will provide a practical deterrent to the "trivial" lawsuit.

Yet, setting aside *Rutan*'s "birthday party" illustration, the "objectively chilling" standard, by focusing on the substantive effect of the retaliation rather than on the form of the retaliation, appears precisely in line with this Court's traditional position that First Amendment injury occurs when governmental actions penalize, inhibit, and chill the free exercise of core First Amendment freedoms. By requiring retaliation that is sufficiently severe to deter a person of ordinary firmness from freely exercising his First Amendment rights, the standard is neither overinclusive nor underinclusive in identifying injury of First Amendment significance. By providing a cause of action whenever governmental retaliation is objectively sufficient to undermine First Amendment values, the "objectively chilling" test avoids the arbitrary underinclusiveness fatal to both the Fifth Circuit's rigid short list and the "substantial

equivalent of dismissal" test rejected in *Rutan*. At the same time, the "objectively chilling" test avoids overinclusiveness by ensuring that employees with unusually fragile psyches will not be able to "make a federal case" out of trivial, albeit retaliatory, responses to their First Amendment activity.

Had the *Breaux* case arisen in any other circuit, the retaliation suffered by the Plaintiffs would have been sufficient to constitute a First Amendment injury and support an award of damages. The series of retaliatory actions endured by Breaux and Ambrogio indisputably would meet the "any discipline" test. Moreover, the Defendants' campaign of retaliatory harassment is plainly actionable under the "objectively chilling" standard, because it surely was sufficient to chill persons of reasonable firmness from continuing to freely exercise their right to speak on matters of public concern.[9] Indeed, not only was the campaign of harassment suffered by Ambrogio and Breaux more severe than the retaliation in *Bart, Piecynski, Walsh, Suppan,* and *Allen,* but if Breaux and Ambrogio had given in and

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[9] *See, e.g., Bart v. Telford,* 677 F.2d 622, 625 (7th Cir. 1982) ("campaign of harassment which though trivial in detail may have been substantial in gross" not insufficient as a matter of law to deter person of ordinary firmness from exercising right of free speech); *Piecynski,* 875 F.2d at 1336 (7th Cir. 1989) ("false accusations and petty humiliations, if orchestrated into a campaign of political retaliation, are actionable"); *Walsh v. Ward,* 991 F.2d 1344, 1345 (7th Cir. 1993) ("A campaign of petty harassment may achieve the same effect as an explicit punishment."); *Suppan,* 203 F.3d at 234-35 (3rd Cir. 2000) (campaign of retaliatory harassment including low evaluations, resulting in humiliation, stress, anxiety, loss of reputation, and sleeplessness, held sufficient "to deter a person of ordinary firmness" from exercising his First Amendment rights, even if the low evaluations caused no loss of promotion): *Allen,* 812 F.2d at 434 n.17 (9th Cir. 1987) ("While the individual incidents of verbal intimidation and abuse may seem insubstantial, we cannot say as a matter of law that the exercise of First Amendment rights was not deterred.").

quit, their surrender likely would have qualified as a "constructive discharge" that would have supported a First Amendment claim even under the Fourth Circuit's old "substantial equivalent of dismissal" test. An employee, however, should not have to quit in order to possess a First Amendment claim.

The Fifth Circuit's adverse employment action threshold requires public employees to make a substantially greater showing of severity than in any other circuit in the country. It is also the only circuit that focuses primarily on the form of governmental retaliation rather than on the substantive effect the retaliation has on public employees' free exercise of First Amendment rights. Because of the Fifth Circuit's arbitrarily restrictive approach, it is increasingly apparent that public employees in the Fifth Circuit have less First Amendment protection from retaliation for exercising core First Amendment freedoms than public employees anywhere else in the country. This Court should therefore resolve the conflict created by the Fifth Circuit's extreme approach to this fundamental First Amendment issue.

CONCLUSION

For the foregoing reasons, petitioners respectfully urge the Court to grant a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Dated: May 19, 2000

APPENDIX

Allen BREAUX and Joe Ambrogio,
Plaintiffs-Appellees-Appellants,

v.

CITY OF GARLAND, et al., Defendants,

City of Garland, Defendant-Appellee,
Terry Hensley and Ron Holifield,
Defendants-Appellants.

No. 98-10638.

United States Court of Appeals,
Fifth Circuit.

Feb. 23, 2000.

Appeals from the United States District Court for the Northern District of Texas.

Before JONES and WIENER, Circuit Judges, and WALTER*, District Judge.

EDITH H. JONES, Circuit Judge:

This case involves the First Amendment retaliation claims of two police officers against the City of Garland ("City"), its former Police Chief, and its former City Manager. Officers Allen Breaux and Joe Ambrogio (the "Plaintiffs") argue that Terry Hensley and Ron Holifield (the "individual Defendants"), and later the City, violated 42 U.S.C. § 1983 by retaliating against the Plaintiffs for making public allegations of corruption in the Garland Police Department.

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* District Judge of the Western District of Louisiana, sitting by designation.

The jury found the individual Defendants liable, and even after a large remittitur was accepted by the Plaintiffs, the district court entered judgment exceeding $8 million, plus attorneys' fees, for the Plaintiffs. Both sides have appealed. We conclude that the judgment is fatally flawed because the Plaintiffs failed to prove that official retaliation against them was sufficiently serious to constitute a constitutional injury. No other reversible error has been raised.

I. FACTUAL BACKGROUND

This case is factually complex, as evidenced by the parties' continuing disagreement about what happened in the City of Garland and the Garland Police Department between 1992 and 1994. The following review of the facts is guided by the jury verdict favoring Breaux and Ambrogio. In the beginning of 1992, the City hired Holifield as its City Manager. The Garland City Council instructed Holifield to hire a new police chief from outside the department. Holifield ultimately hired Hensley, who started working for the City in April 1992. During the summer of 1992, Hensley contacted the FBI's Dallas office to discuss possible land acquisitions and flips made by members of the City administration.

In October 1992, Hensley met FBI Agent Largent, the supervisor of the white collar crime squad for public corruption, to discuss the land deals over lunch. Two other Garland police officers, Jody Lay ("Lay") and Larry Wilson ("Wilson"), were present at this meeting. During the conversation, it became clear that the FBI was beginning to investigate the possible involvement of some

current and former council members in two City of Garland real estate transactions. According to Wilson, Hensley conducted the meeting and told the FBI agent who and what Hensley wanted investigated. The subjects included former Garland mayor Billy Earl Tomlinson ("Tomlinson"); former City Councilman James Ratliff ("Ratliff"); and Garland Councilman Vernon Gaston ("Gaston").[1] Lay continued to assist the FBI until late 1992 when Officer Joe Harn ("Harn") took over for Lay. The FBI initiated a second investigation concerning possible Garland public corruption in relation to a landfill deal between the City and Waste Management, Inc., which was allegedly brokered by Ratliff and Gaston.

During the summer of 1992, Hensley put Lay in charge of the Intelligence Unit of the Department. Hensley told Lay that he was concerned about the current direction of the Unit as well as the performance of the two officers in the Unit. Hensley was particularly concerned with Breaux, who Hensley thought devoted too much of his time to Asian gangs. Lay apparently shared these concerns; in a September 11, 1992, memo to

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[1] According to the Plaintiffs, Ratliff, Gaston, and Tomlinson were all close friends and political allies. Wilson was also a good friend of Tomlinson. The Plaintiffs contend that Hensley instructed the FBI to investigate these individuals because they were "political enemies" of Hensley. The Plaintiffs also assert that Holifield played a significant role in the FBI investigation by acting as a "confidential informant" for the FBI. Holifield participated in the investigation at the request of the FBI, before he made the statements that serve as the basis for the Plaintiffs' § 1983 claim.

Hensley, Lay requested that Breaux be transferred out of the Intelligence Unit.

Breaux was then a 20-year veteran officer. Officer Breaux testified that he asked to be transferred back to patrol duty after Lay informed him, during a truck ride in the country, that Hensley and Lay "were redirectionalizing the Intelligence Unit to start doing political investigations for Charlie Hinton, the city attorney, and members of the city council."[2] Breaux was unwilling to engage in "political investigations" instituted by the new police chief. Although Breaux contemporaneously reported his conversation with Lay to Lieutenant David Swavey, he did not otherwise pursue the matter.

After being transferred out of the Intelligence Unit, Breaux remained on patrol duty until late 1993. In November 1993, Breaux received a poor performance review from his supervisor and was assigned to front desk duty at the Department.[3]

In the Spring of 1994, Officer Breaux, newly-elected vice-president of the Garland Police Officers Association

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[2] Lay contends that he went with Breaux to discuss Lay's recommendation in the memo. Lay maintains that during the ride he said only that the Unit would handle "high level 'public corruption' cases;" Lay denies any discussion of political investigations.

[3] Breaux's supervisor reported that Breaux would not adequately enforce traffic laws because Breaux questioned the legality of (1) requiring people to have driver's licenses and (2) confiscating weapons.

("GPOA"), told Detective Ambrogio, the GPOA president, about the previous attempt to recruit him for political investigations. Shortly thereafter, the GPOA conducted a survey of all Department employees to identify morale problems and to determine how to overcome any such problems. Upon learning of the survey, Chief Hensley became very upset and upbraided Ambrogio about it.

In March 1994, Holifield met with the GPOA Board to discuss the survey. During this meeting, Breaux first revealed to the City Manager the alleged illegal political investigations being run by Chief Hensley. Breaux also told Holifield that the station was wired so that a former police chief could monitor any telephone conversation in the building. The GPOA Board members were concerned that someone might try to monitor their calls after the results of the survey were published. After Breaux mentioned the alleged investigations, Holifield immediately ordered that any ongoing investigations were to remain confidential. Holifield also expressed his concern with GPOA tactics and allegedly threatened to "destroy" the GPOA if it acted "politically" with respect to these allegations or the survey results. But Holifield offered to work with the GPOA if the GPOA would keep politics out of the Department. With the apparent approval of Breaux and Ambrogio, Holifield agreed to investigate the GPOA allegations. Toward this end, Holifield reported the allegations to Hensley.

At this point, the retaliation began. Hensley informed Lay of the allegations of politically motivated investigations, and Hensley brought an Internal Affairs charge,

investigation I/A 94-12, against Breaux for making false statements – about the investigations.

Soon thereafter, Holifield discovered that film was missing from a secret camera, which had been installed in his office to catch suspected intruders. Realizing that police officers would recognize the hidden camera and knowing that the GPOA Board had been in his office for the March 1994 meeting, Holifield told Hensley about the missing film. Hensley initiated Internal Affairs investigation I/A 94-13 against all the GPOA Board members to determine if they had stolen the film.[4]

Detective Ambrogio, on the advice of a lawyer from the Combined Law Enforcement Association of Texas ("CLEAT"), then held a press conference, where he, the lawyer, and a City Councilman who was one of the targets of the alleged investigations, made expansive allegations about illegal political investigations being conducted by Hensley and Holifield.[5] Relying on statements made by Breaux during the meeting in Holifield's office,

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[4] After the March 1994 meeting in Holifield's office, Gaston admitted that someone had told him about the hidden camera, but Gaston refused to identify who it was. The investigation of all the officers present was narrowed to an investigation of Ambrogio for interfering with an investigation and revealing confidential information. Although the ensuing investigation failed to determine who stole the film, Ambrogio later admitted that he had made the unauthorized disclosure to Gaston.

[5] Ambrogio first received notice that he would be questioned in I/A 94-13 on April 18, 1994. After consulting with the CLEAT attorney, Ambrogio called the GPOA press conference on April 20, 1994.

Ambrogio and the others also alleged that the Department was conducting electronic surveillance of its employees since the phones in the Department were bugged. The CLEAT attorney, Bob Hasty, went so far as to inquire whether there is "in fact, a Gestapo type of . . . secret intelligence organization that is doing political investigations of police officers."[6] Hasty further propagated Breaux's allegations in letters to law enforcement authorities in the state. These public statements led to another Internal Affairs investigation, I/A 94-14, which focused on Ambrogio's possible violation of several General Orders of the police department. Investigators recommended that the charges in 94-14 be sustained and the Chain of Command Board agreed.

As part of the investigations, Breaux and Ambrogio were both questioned on several occasions, and Breaux was required to take a polygraph administered by the Department. The Internal Affairs investigations concluded that Breaux and Ambrogio had lied in making their allegations of corruption. Hensley publicly posted the results of the investigations in the Department and made the results available to several local media outlets, leading everyone in the department to know the Plaintiffs were "in trouble." Breaux was also required to undergo a

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[6] During the press conference, CLEAT and the GPOA requested an external investigation into the Department's activities. The Texas Rangers investigated Hensley's conduct in May 1994 and reported "a complete lack of evidence of wrongdoing on the part of Chief Hensley or his staff." At the request of Ratliff, the FBI also investigated Hensley's conduct. The FBI reached the same conclusion as the Texas Rangers.

psychiatric exam following comments he made to another officer while *en route* to the Department polygraph test.[7]

Following the various interviews, Internal Affairs investigations, and polygraphs, Breaux was placed on paid administrative leave. In May 1994, Hensley called each Plaintiff into his office separately, telling each that he could keep his job if he accepted a short suspension and signed a letter, the terms of which were to be mutually agreed to, retracting all of his allegations. Both men refused the agreement offered by Hensley. Hensley took no further action with respect to Breaux and Ambrogio.

Later in May, Ratliff was elected mayor of Garland. An ally of those whom Hensley had been investigating, Ratliff caused both Chief Hensley and City Manager Holifield to resign. In the few months following Hensley's resignation, the new Acting Police Chief Barnett "non-sustained" the Internal Affairs charges against Breaux and Ambrogio. Nevertheless, after returning from his paid administrative leave in July 1994, Breaux was assigned to the Telephone Response Unit ("TRU"). Breaux contends that Lay was a friend of Barnett's and that Barnett thought Breaux should be punished with this assignment. (According to the City, Breaux was assigned to the TRU, a position similar to the one he had at the front desk, in order to accommodate his shift preferences.) Breaux subsequently wrote to Barnett complaining about his assignment to the TRU and requesting a transfer back to patrol duty. Chief Barnett granted

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[7] Breaux told the officer that Breaux was surprised that someone had not already shot an Internal Affairs investigator between the eyes.

Breaux's request, and Breaux returned to patrol duty in November 1994.

Neither Breaux nor Ambrogio suffered a reduction in pay. Both remain employed by the City of Garland.

II. PROCEDURAL HISTORY

In October 1994, Breaux and Ambrogio filed suit against the City, Holifield, and Hensley alleging that the defendants were liable under 42 U.S.C. § 1983 for violating the Plaintiffs' constitutional rights to free speech and free association. Breaux also alleged that the City violated the Texas Whistleblower Act, Tex. Gov't Code Ann. § 554.001, et seq., by retaliating against him for reporting wrongdoing involving Holifield and Hensley. The case was removed from state to federal court.

Responding to serial motions for summary judgment by the City, the district court first held that the statute of limitations barred all of the Whistleblower Act claims except for Breaux's claim that his assignment to the TRU in July 1994 was in retaliation for reporting possible political investigations. Later, the district court granted summary judgment on the Plaintiffs' § 1983 claim against the City on the ground that Hensley and Holifield did not have "final policy-making authority" for the City with respect to "police officer employment decisions."

After a seven-day trial, the jury found Hensley and Holifield individually liable under § 1983, ordering actual damages against each defendant for each Plaintiff in amounts exceeding a half million dollars. Each individual Defendant was also ordered to pay $5,000,000 in punitive

damages to each Plaintiff. The City was found liable to Breaux under the Whistleblower Act for $527,500 in actual damages and $5,000,000 in punitive damages. The total award to both Plaintiffs amounted to $27,707,012.

The court entered judgment on the verdict but then responded to various post-judgment motions. The district court granted the City's Motion for Judgment as a Matter of Law on the Whistleblower Act claim, holding that Breaux had failed to exhaust his administrative remedies. The court also found that the jury's findings of lost earning capacity and part of the award to Breaux for lost past income were not supported by the evidence. The court accordingly reduced the actual damages, proportionally reduced the punitive damages, and required a remittitur from the Plaintiffs. The Plaintiffs accepted the remittitur. As a result, Breaux and Ambrogio were awarded, jointly and severally from the Defendants, $6,258.75 and $2,256 respectively for past lost income, and severally from each defendant $150,000 for lost reputation, $50,000 for mental anguish, and $2,000,000 as punitive damages. The Amended Judgment dismissed Plaintiffs' claims against the City with prejudice and awarded total damages in the amount of $4,406,258.75 to Breaux and $4,402,256 to Ambrogio, plus post-judgment interest, reasonable attorneys' fees, and expenses and costs.

Hensley and Holifield contend on appeal that (1) the Plaintiffs' speech is false or reckless as to its truth or falsity and therefore not constitutionally protected (or at least they reasonably could have believed it was unprotected), (2) neither Plaintiff suffered an adverse employment action, and (3) the damages are excessive. Breaux contends on cross-appeal that he did properly

exhaust his administrative remedies as required by the Whistleblower Act.[8]

III. ANALYSIS

A. Chief Hensley

The jury was persuaded that Breaux and Ambrogio became the objects of a vendetta by Chief Hensley and City Manager Holifield, once they blew the whistle on politically-motivated investigations of Garland City Council members by the City's top employees. No doubt the jury was powerfully influenced by the corroborating testimony of Wilson and Ratliff, who (in the wake of the officers' allegations) had become Chief of Police and Mayor, respectively.

This finding is, however, not the end of the matter. In order to establish a constitutional claim for retaliation against the exercise of one's First Amendment rights, four elements must be shown:

> First, the Plaintiffs must suffer an adverse employment decision. Second, the Plaintiffs' speech must involve a matter of public concern. Third, the Plaintiffs' interest in commenting on matters of public concern must outweigh the Defendants' interest in promoting efficiency. Fourth, the Plaintiffs' speech must have motivated the Defendants' action.

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[8] Other issues have been raised by the parties. We have considered them and conclude they are either meritless or subsumed by the dispositive issues.

Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 220 (5th Cir.1999) (citations omitted).

A major dispute between the parties throughout this litigation has persisted over whether Plaintiffs' allegations of corrupt political investigations by Hensley and Holifield were false, and if so, whether false or reckless allegations merit First Amendment protection. This complaint is answered on one level by the precise wording of the jury charge. In arriving at a verdict for the Plaintiffs, the jury was required by the court's charge to find the Plaintiffs' allegations true.[9]

Hensley and Holifield nevertheless continue to label the allegations bogus and to assert that false allegations of corruption are constitutionally unprotected, but neither they nor their opponents address what standard of review we must employ concerning the jury verdict. In this circuit, several opinions refused to determine the standard of review because of uncertainty as to whether First Amendment rights raise a legal question or a mixed

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[9] More problematic is that the court also submitted to the jury the critical second and third elements of the retaliation claim. The second and third elements of the test outlined above examine whether a public employee's speech deserves First Amendment protection by balancing the nature of the speech, i.e. its relation to matters of public rather than purely personal concern, against the need of government entities as employers to maintain a harmonious, efficient workplace. *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). District courts in this circuit have been predisposed to submit claims in this fashion, but, insofar as the second and third elements are questions of law, this court has expressed its concern about the practice. *See Brady v. Fort Bend County*, 145 F.3d 691, 708 n. 7 (5th Cir.1998).

question of law and fact. *See Brady*, 145 F.3d at 708 n. 7 (citing cases). In one recent case, however, this court cited a de novo standard for First Amendment claims and then reversed a jury verdict favoring retaliation plaintiffs. *Harrington v. Harris*, 118 F.3d 359 365 (5th Cir.1997). As *Harrington* assumed arguendo that plaintiffs' speech was entitled to First Amendment protection, the offhand invocation of a *de novo* standard of review made no difference on that issue.

Like its predecessors, this opinion will not have to resolve the uncertainty over the standard of review, and the issue may be deferred again for a future panel. As in *Harrington*, we assume *arguendo* that the evidence supports the jury's finding that the Plaintiffs reported truthful allegations of public corruption in the police department. Truthful allegations of such a nature implicate matters of public concern.[10] The only question then remaining is whether Officers Breaux and Ambrogio suffered adverse employment actions after the March 1994

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[10] If the allegations of corruption are true, such allegations are matters of public concern and outweigh the government's interest in efficiency. *See Teague v. City of Flower Mound*, 179 F.3d 377, 381 (5th Cir.1999); *Brawner v. City of Richardson*, 855 F.2d 187, 191-92 (5th Cir.1988) ("The disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of a police department." (footnotes omitted)).

meeting with Holifield and the subsequent press conference when they spoke out.[11] *Harrington*, 118 F.3d at 365.[12]

Fifth Circuit caselaw, some of which post-dates the trial in this case, is inconsistent with Breaux's and Ambrogio's contention that they suffered actionable adverse employment actions. "Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Pierce v. Texas Dep't of Criminal Justice, Institutional Div.*, 37 F.3d 1146, 1149 (5th Cir.1994). Transfers can constitute adverse employment actions if they are sufficiently punitive, *see id.* at 1150, or if the new job is markedly less prestigious and

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[11] Defendants do not contest the fourth element of the retaliation claim identified in *Harris*. They acknowledge that Breaux and Ambrogio were subjected to various disciplinary actions because of their explosive allegations.

[12] The jury found that Plaintiffs were retaliated against for exercising their First Amendment rights of free speech and association. This court's analysis focuses on the Plaintiffs' freedom of speech claims but applies equally to the freedom of association claims: "When a plaintiff's claims arise under both freedom of speech and freedom of association, as in the case at bar, the freedom of association claims are analyzed under the same *Pickering* balance test used to determine the success of the freedom of speech claims." *Anderson v. Pasadena Indep. Sch. Dist.*, 184 F.3d 439, 444 (5th Cir.1999). In this circuit, *Harris* sets out the requirements for First Amendment retaliation claims generally. The only difference between the requirements for a retaliation claim predicated on free speech and one predicated on free association is that the latter "is not subject to the threshold public concern requirement." *Boddie v. City of Columbus, Mississippi*, 989 F.2d 745, 747 (5th Cir.1993). As a result, the Plaintiffs' freedom of association claims fail for the same reason as their freedom of speech claims, namely the absence of an adverse employment action.

less interesting than the old one, *see Click v. Copeland*, 970 F.2d 106, 110 (5th Cir.1992). This court has "declined to expand the list of actionable actions, noting that some things are not actionable even though they have the effect of chilling the exercise of free speech." *Benningfield v. City of Houston*, 157 F.3d 369, 376 (5th Cir.1998) (citing *Pierce*, 37 F.3d at 1150). The reason for not expanding the list of adverse employment actions is to ensure that § 1983 does not enmesh federal courts in "relatively trivial matters." *Dorsett v. Board of Trustees*, 940 F.2d 121, 123 (5th Cir.1991). For example, in the education context, this court has held that " 'decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures,' while extremely important to the person who dedicated his or her life to teaching, do not rise to the level of a constitutional deprivation." *Harrington*, 118 F.3d at 365 (quoting *Dorsett*, 940 F.2d at 123).

Given the narrow view of what constitutes an adverse employment action, this court has held that the following are *not* adverse employment actions: (1) mere accusations or criticism, *see Harrington*, 118 F.3d at 366; (2) investigations, *see Pierce*, 37 F.3d at 1150; (3) psychological testing, *see Benningfield*, 157 F.3d at 376; (4) false accusations, *see Colson v. Grohman*, 174 F.3d 498, 511 (5th Cir.1999); and (5) polygraph examinations that do not have adverse results for the plaintiff, *see Pierce*, 37 F.3d at 1150.

The foregoing legal framework makes clear why Breaux and Ambrogio have not suffered any adverse employment actions. Hensley ordered Internal Affairs investigations of Breaux and Ambrogio after they made allegations of illegal political investigations, but, as *Pierce*

and *Colson* hold, investigating alleged violations of departmental policies and making purportedly false accusations are not adverse employment actions. *See Pierce*, 37 F.3d at 1150; *Colson*, 174 F.3d at 511; *see also Benningfield*, 157 F.3d at 376. Hensley's requiring Breaux to undergo a psychological exam after Breaux's intemperate remark to a fellow employee also is not an adverse employment action. *See Benningfield*, 157 F.3d at 376. Although Breaux was placed on administrative leave from late April to July 1994, Breaux was paid while on leave and returned to his pre-leave position.[13] Thus, Breaux suffered no adverse action with respect to the leave. *See Benningfield*, 157 F.3d at 378 (plaintiff did not suffer adverse employment action when promotion was delayed two years in response to her exercising her free speech rights because she eventually received the promotion with retroactive pay and seniority). Similarly, any criticism, such as Hensley's oral threats or abusive remarks, does not rise to the level of an adverse employment action. *See Harrington*, 118 F.3d at 366.

More troubling are Chief Hensley's public posting of the findings of the Internal Affairs investigation and his attempt to get Breaux and Ambrogio to sign resignation letters. Although posting the results of the Internal Affairs investigation in the station may have comported with Departmental regulations, Hensley's disseminating

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[13] Breaux did not allege that his initial transfer out of the Intelligence Unit, made at his request, or his assignment to desk duty in November 1993 were retaliatory. It was not until March, 1994 that he first exercised his free speech rights by publicly alleging corruption.

that information to the media went "several steps beyond a criticism or accusation and even beyond a mere investigation" and was "punitive in a way that mere criticisms, accusations, and investigations are not." *Colson*, 174 F.3d at 512 n. 7. The reprimands went, at least temporarily, on Breaux's and Ambrogio's permanent records.

However, this court recognizes that a rescinded reprimand does not rise to the level of an adverse employment action: "[if] the reprimand was rescinded through internal [Houston Police Department] procedures . . . [it] does not constitute an adverse employment action." *Benningfield*, 157 F.3d at 377. After becoming Chief of Police, Barnett "non-sustained" the charges against Breaux and Ambrogio. The Plaintiffs contend that "an after-the-fact, unpublicized correction could not and did not undo the injury that Hensley's earlier reprimand caused." But the record does not indicate what employment injury the Plaintiffs have suffered. Breaux and Ambrogio are in a position similar to that of the law professors in *Harrington*. *See Harrington*, 118 F.3d at 366. Neither Plaintiff has been discharged from the Garland Police Department. Neither Plaintiff has been demoted, denied a promotion, suffered a reduction in pay, or lost seniority as a result of his speech. In fact, the only parties to the present suit who have lost their jobs are Hensley and Holifield. Thus, Chief Barnett's non-sustaining the charges through internal procedures precluded an adverse employment result.[14]

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[14] The Plaintiffs' concern with the publication of the Internal Affairs investigations to the media suggests that they want to import defamation into the adverse employment prong

The Plaintiffs also contend that Hensley's attempts to get them to recant their allegations constitute threats of discharge which, under *Harrington* and *Click*, are adverse employment actions.[15] However, *Harrington* and *Click* do not establish that a threat of discharge is itself sufficient to establish an adverse employment action. In summarizing the evidence, the *Harrington* court said only that "the evidence is clear that no Plaintiff has been discharged or threatened with discharge. . . . " 118 F.3d at 366. Not only was the court not defining the requirements for making out a successful retaliation claim under § 1983, but the court was explaining that the plaintiffs' retaliation claims must fail because the plaintiffs suffered no adverse consequences for exercising their speech rights.

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of their retaliation claim. But the Plaintiffs have not made a defamation claim, nor is defamation part of the present § 1983 action. Furthermore, this court has recognized that "[w]hen an employee retains his position even after being defamed by a public official, the only claim of stigma he has derives from the injury to his reputation, an interest that [*Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976),] reveals does not rise to the level of" a Fourteenth Amendment violation. *Moore v. Otero*, 557 F.2d 435, 437-38 (5th Cir.1977). Stigma by itself, without an impact on one's employment, does not constitute an adverse employment action. *See Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir.1995) ("We have applied the holding of *Paul* by requiring a section 1983 plaintiff to show stigma plus an infringement of some other interest." (citation omitted)).

[15] The other verbal criticisms that the Plaintiffs allege took place at the chain of command board hearings are not adverse employment actions. *See Harrington*, 118 F.3d at 366 ("mere criticisms do not give rise to a constitutional deprivation for purposes of the First Amendment.").

In *Click*, the court principally discussed whether transfers that were effectively demotions, as opposed to threats of discharge, were actionable. As the *Click* court stated, the government " '*may not deny a benefit* to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.' " 970 F.2d at 109 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972)) (emphasis added). Some benefit must be denied or some negative consequence must impinge on the Plaintiff's employment before a threat of discharge is actionable.[16]

Click also stated that "even the threat of discharge can be a potent means of chilling the exercise of constitutional rights." *Click*, 970 F.2d at 109. For this purpose, *Click* referred to the Supreme Court's analysis in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574, 88 S.Ct. 1731, 1737, 20 L.Ed.2d 811 (1968). *Pickering* does not, however, state that

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[16] *See also Bickel v. Burkhart*, 632 F.2d 1251, 1255 n. 6 (5th Cir.1980) ("impermissible retaliation [need] not result in the termination of his employment" in order to be actionable under § 1983, but the employer's actions must alter "*important conditions* of employment") (emphasis added). The record does not demonstrate that the alleged threat of discharge altered any important conditions of the Plaintiffs' employment. Hensley took no further action with respect to either Plaintiff after the Plaintiffs refused to sign the letters of retraction. Breaux was already suspended with pay, and the Internal Affairs investigations had already been completed. *Compare Fyfe v. Curlee*, 902 F.2d 401, 404-05 (5th Cir.) (transfer without loss in pay to menial, undemanding job is actionable under § 1983), cert. denied, 498 U.S. 940, 111 S.Ct. 346, 112 L.Ed.2d 310 (1990).

a threat of discharge alone will suffice for a First Amendment retaliation claim. The facts before the Court involved not a threat, but the actual dismissal of a teacher for writing a letter to a newspaper critical of the local school board. In the statement quoted above by *Click*, the Supreme Court was comparing dismissals of public employees with criminal sanctions and damage awards for defamation, two other devices that had been used to penalize the exercise of free speech rights – before the Supreme Court outlawed them.[17] Had the Court not spoken in *Pickering*, and prevented retaliatory dismissals for exercise of First Amendment rights, threats of dismissals could chill constitutional rights because they could be backed up. As the law stands now, retaliatory threats are just hot air unless the public employer is willing to endure a lawsuit over a termination. *Pickering's* (and by extension, *Click's*) reference to threats of termination illustrated the problem if threats could be realized; the Court did not hold or imply that threats of termination alone, in a post-*Pickering* world in which retaliatory discharge is outlawed, would generate liability.

Breaux contends that his transfer to the Telephone Response Unit ("TRU") was similar to the transfer that was found in *Click* to be an adverse employment action. Although initially compelling, this argument is without merit on a closer look at the record. First, Breaux was

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[17] The Court ultimately declined fully to equate employee dismissals with constitutional rights in defamation cases, precisely because in the former, a balance must be maintained between the public interest in an orderly workplace and the discussion of issues of public concern.

assigned to the TRU by Barnett only after Hensley had been fired. The record does not show that Hensley caused Breaux to be transferred. Second, since Breaux was already on front desk duty, the transfer did not constitute a punitive action by the department. Although Breaux felt that the TRU was a step down, " 'a plaintiff's subjective perception that a demotion has occurred is not enough' to constitute an adverse employment decision." *Harris*, 168 F.3d at 221 (quoting *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir.1996)). At trial, Chief Wilson, the Plaintiffs' first witness, testified that the TRU assignment is not viewed as punishment in the Garland Police Department and that the TRU carries out an important function within the Department. Thus, since the transfer is not traceable to Hensley and is a position similar to front desk duty, the transfer does not constitute an adverse employment action.

Finally, the Plaintiffs argue that, even if the individual actions taken by Hensley do not constitute an adverse employment action, the aggregate of these actions constitutes a "vengeful vendetta" actionable under § 1983. For this idea, the Plaintiffs cite only *Thompson v. City of Starkville*, 901 F.2d 456 (5th Cir.1990), which observed: "Although it may be difficult to delimit exactly what conduct, in the abstract, violates a public employee's first amendment rights, a vengeful vendetta seeking an employee's job because of his speech on a matter of public concern surely falls within the ambit." *Id.* at 470. But *Thompson* is not as broad as the Plaintiffs suggest. The constituent acts and the final result of the vendetta were worse than most of the alleged retaliatory actions by

Hensley: The defendants accused the plaintiff police officer of committing a burglary, alleged that he threatened another officer, caused the plaintiff to be disciplined more severely than other officers for the same offense, and ultimately were instrumental in having him fired. *See id.* at 469.

Thompson is thus consistent with this court's holding in *Colson*. In *Colson*, this court evaluated when a campaign of retaliatory harassment amounted to an adverse employment action. To be actionable, "the campaign of retaliatory harassment [must] rise to such a level as to constitute a constructive adverse employment action." *Id.* at 514. The court explained "constructive adverse employment action" by reference to two cases. The court held that in *Sharp* the plaintiff was "constructively demoted . . . because the defendants created an 'intolerable situation' causing her to transfer to a less desirable position." *Id.* (quoting *Sharp v. City of Houston*, 164 F.3d 923, 934 (5th Cir.1999)). The *Colson* Court also relied upon *Benningfield*. 174 F.3d at 513. Although one plaintiff in *Benningfield* resigned as a result of a campaign of harassment, the court held that a reasonable person in her position would not have felt compelled to resign. Since Breaux and Ambrogio still have their jobs with the Department and have neither been demoted nor transferred to less desirable positions, they have failed to show that the Defendants' actions amounted to a constructive or actual adverse employment action.

B. City Manager Holifield

Despite Holifield's limited interaction with the Plaintiffs, the jury found Holifield liable under § 1983 for over $4 million in damages. On appeal, Holifield argues that there was insufficient evidence to show that, as required by the language of § 1983, he "cause[d]" the Plaintiffs to be subjected to First Amendment violations. As noted, whether the Plaintiffs alleged any adverse employment actions by Holifield is a question of law reviewed *de novo*. *See Harrington*, 118 F.3d at 365.

In "assessing an individual supervisor's liability under § 1983," this circuit applies the *City of Canton* standard of municipal liability. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir.1994) (en banc). Under this standard, a supervisor is liable under § 1983 only if (1) his conduct directly causes a constitutional violation or (2) the plaintiffs can show that the supervisor was "deliberately indifferent" to a violation of a constitutional right. *Id.* at 454 n. 8. (citing *City of Canton*, 489 U.S. 378, 388 n. 8, 109 S.Ct. 1197, 1204 n. 8, 103 L.Ed.2d 412 (1989)).

Holifield did not cause the Plaintiffs to suffer a violation of their First Amendment rights. His direct contact with the Plaintiffs was limited. During the March 1994 meeting with the GPOA Board members, Holifield threatened to "destroy" the GPOA if the group acted politically within the department. With the assent of Breaux and Ambrogio, Holifield referred Breaux's allegations of politically-inspired investigations to Hensley. Holifield also notified Hensley that film was missing from the hidden camera in his office and suggested that one of the GPOA Board members, who had recently met with him

there and could recognize the camera, might have stolen the film.

Internal Affairs investigations were commenced with respect to Breaux's allegations of corruption and the missing film. But, since neither of these investigations constitutes an adverse employment action, *see Benningfield*, 157 F.3d at 376, Holifield's role in initiating the investigations is not a sufficient "cause" to establish liability under § 1983. *See Heil v. Santoro*, 147 F.3d 103, 110 (2d Cir.1998) ("There being no First Amendment violation in investigating, the reason for the investigation created no material issue to be tried."). Similarly, Holifield's criticism of and threat to destroy the GPOA are not adverse employment actions. *See Harrington*, 118 F.3d at 366.

The result is the same if Holifield's conduct is viewed from the perspective of his supervisory role. Liability is imposed only if he was deliberately indifferent to subordinates' violations of the Plaintiffs' constitutional rights. Laying aside the question whether the city manager was a supervisor of anyone in the Police Department, the fact that Plaintiffs' First Amendment rights were not actually infringed exonerates Holifield from supervisory liability.

C. *The City of Garland*

1. Breaux's appeal

Breaux appeals the district court's summary judgment on his § 1983 claim against the City and post-verdict judgment as a matter of law on his Whistleblower Act claim. The district court granted summary judgment to

the City on all § 1983 claims, holding that no injury was caused by a municipal policymaker.

Because of a short limitation period under the Whistleblower Act, Breaux's state law claim against the City is based solely upon his transfer to the TRU for several months in 1994. The district court granted judgment as a matter of law on the Whistleblower Act claim because Breaux failed to exhaust his administrative remedies.[18] Breaux contends that exhaustion was not required because the police department's Internal Affairs process did not allow for complaints against the Chief of Police, but, in the alternative, he did file such a complaint. This court reviews the district court's judgment as a matter of law *de novo*. *Pierce*, 37 F.3d at 1149.

The exhaustion requirement of the Texas Whistleblower Act is jurisdictional and, therefore, mandatory and exclusive. *See Essenburg v. Dallas County*, 988 S.W.2d 188, 189 (Tex.1998) ("It is true that a plaintiff's failure to exhaust administrative remedies may deprive courts of subject matter jurisdiction in the dispute . . . [since] the exhaustion requirement seeks to assure that the appropriate body adjudicates the dispute – the hallmark of a jurisdictional dispute."). Moreover, the Whistleblower Act requires "the employee to utilize all procedures in place for resolving disputes at the governmental entity."

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[18] *See* Tex. Gov't Code Ann. § 554.006(a) (West 1994) ("An employee of a local government must exhaust that government's grievance or appeal procedures relating to suspension or termination of employment or unlawful discrimination before suing under this chapter.") (amended 1995).

Gregg County v. Farrar, 933 S.W.2d 769, 775 (Tex.App. – Austin 1996, writ denied). Contrary to Breaux's claim on appeal, the Internal Affairs process of the Garland Police Department is broad enough to encompass claims against the Chief of Police. Under General Order 76-29, the policy of Internal Affairs is to investigate "all complaints . . . of misconduct of employees who are sworn police officers." General Order 76-29. Misconduct is defined to include a violation of the general orders of the Department. In response to the City's motion for judgment as a matter of law, Breaux characterized his complaint as being "that Chief Barnett and his subordinates were retaliating against him by transferring him to the TRU for 'blowing the whistle' on Barnett's allies, Hensley and Jody Lay."[19] By alleging that the Chief of Police violated the Whistleblower Act, Breaux invoked both General Order 76-5, which subjects an officer to disciplinary action for violating state law, and General Order 76-29, which proscribes misconduct. The administrative remedy was available to Breaux.

Breaux argues, however, that the Internal Affairs process could not resolve complaints against the Chief of Police; filing a complaint with Internal Affairs would be futile since the Chief of Police determines whether an

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[19] In order to show that his complaint falls outside the scope of the Internal Affairs process, Breaux also characterizes his complaint as an "employment-related dispute." But if his complaint involved only an employment dispute, Breaux's complaint would not fall within the Whistleblower Act. Thus, in order to maintain an action under the Act, Breaux must allege a violation of state law by Chief Barnett – a claim that does fall within the purview of Internal Affairs.

investigation should be initiated and ultimately reviews the results. In support of Breaux's claim, Chief Wilson testified that, "I would think if an officer had an accusation to make against the chief of police, it might be appropriate to go outside the Internal Affairs unit to do that . . . [T]here's no guide book that says if you're going to accuse the chief of police of something follow steps one, two and three."

The district court rejected Breaux's argument. Texas courts have recognized a futility exception to exhaustion requirements in only a limited number of circumstances. *See, e.g., Town of Sunnyvale v. Mayhew,* 905 S.W.2d 234, 246 (Tex.App.1994), *rev'd on other grounds,* 964 S.W.2d 922 (Tex.1998); *Methodist Hosps. of Dallas v. Texas Workers' Compensation Comm'n,* 874 S.W.2d 144, 149-50 (Tex.App. 1994, no writ). Since no Texas court has applied a futility exception to statutory, jurisdictional exhaustion requirements, the district court refused to "enlarge existing state law by adopting a futility exception to the Whistleblower Act's exhaustion requirement." This court also refuses to create a futility exception under such circumstances.

The purposes of the exhaustion requirement are to give the employer notice of a grievance and a chance to resolve it. As the Texas Supreme Court recently noted, the exhaustion requirement demonstrates the legislature's "will to have the agency resolve disputed issues of fact and policy." *Essenburg,* 988 S.W.2d at 189. The fact that the Act allows an employee to file a civil suit if the employer has not resolved his complaint in 30 days shows that "the legislature intended that the governmental entity should be afforded the opportunity to correct its own errors by

resolving disputes before being subjected to the expense and effort of litigation." *Farrar*, 933 S.W.2d at 775.

Even if the Department's procedures for filing a grievance against the Chief of Police were unclear, the exhaustion requirement still serves a notice-giving function. Texas courts have recognized a futility exception only in cases where it was impossible for the governmental agency to address an issue, *e.g.*, the constitutionality of a statute.[20] But here, requiring notice even if the available grievance procedures are not clearly delineated would have enabled the City either to develop a record for judicial review on fact questions (if not to resolve the dispute about the transfer) or possibly to mitigate Breaux's damages by transferring him out of the TRU sooner. To repeal exhaustion when grievance procedures are ambiguous would eliminate the notice-giving effect of the Act's exhaustion requirement, which has been held to supersede general presentment requirements.[21] *Id.* at 773. Furthermore, requiring an employee

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[20] The cases Breaux cites as examples of exceptions to the exhaustion requirement involved situations where there clearly was no way for the agency involved to provide relief. *See Texas State Bd. of Pharmacy v. Walgreen Texas Co.*, 520 S.W.2d 845 (Tex.Civ.App.1975) (agency powerless to determine constitutionality of statutes); *City of Austin v. Phipps*, 162 Tex. 112, 344 S.W.2d 673 (1961) (Civil Service Commission given no jurisdiction over denial of injury leave of absence); *Birdville Indep. Sch. Dist. v. First Baptist Church*, 788 S.W.2d 26 (Tex.App. – Fort Worth 1988, writ denied) (agency powerless to decide constitutionality of statute). As discussed above, this is not the case in the present action.

[21] Even if the grievance procedure is ambiguous with respect to filing complaints against the Chief of Police, Texas

to exhaust his remedies, which could delay a civil suit by only 30 days, is hardly onerous or unfair.

In any event, the premise of Breaux's argument for the futility of exhaustion appears incorrect. General Order 76-29 permits Internal Affairs to investigate all complaints against *any* sworn police officer, thus including the Chief of Police. Under General Order 76-29, an officer can complain of misconduct to any supervisor, and "the complainant should be referred to Internal Affairs directly if possible." General Order 78-61 provides for a line of succession in command if the Chief of Police is determined to be incapacitated because, *e.g.*, the Chief is recused from a matter due to a conflict of interest. As a result, the Internal Affairs process is equipped to handle a complaint against the Chief of Police or, at least, to provide the Department and the City with notice of an employee's potential claim. Because the Internal Affairs regulations do not preclude a complaint against the Chief and indeed contemplate the necessity of circumventing

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case law suggests that an employee is not exempt from the need to notify his employer that the employee is about to file a Whistleblower claim in court. Under the Act, when "it is unclear whether the employer has a post-termination grievance procedure, or it is unclear what the procedure is and when . . . the terminated employee [timely] notifies the employer that he is invoking that employee's grievance procedure, informing the employer that it has 30 days in which to conclude the grievance procedure," the employee would meet the statute of limitations provision in the Act. *Beiser v. Tomball Hosp. Auth.*, 902 S.W.2d 721, 724 (Tex.App. – Houston [1st Dist.] 1995, writ denied). Since the limitations period is tolled by a proper invocation of grievance procedures, this holding speaks directly to exhaustion.

the Chief, and because the exhaustion requirement advances Texas' concern with giving employers notice, a futility exception to the Whistleblower Act exhaustion requirement is inappropriate.

Finally, Breaux contends that his letter to Chief Barnett, entitled "Request Consideration for Transfer," effectively initiated the Internal Affairs process for exhaustion purposes. General Order 76-29 provides that an officer's complaint may be "initiated by submitting a written memorandum to the Director of Police Services requesting an investigation and detailing the conduct being complained about." Breaux's letter stated that (1) he "was ordered into the TRU, against [his] will," (2) he "did not request assignment to this position," and (3) "the transfer was directly related to dictates of a previous police administrator." Breaux neither provided any details about retaliatory conduct nor requested an investigation into the transfer. At most, he requested that a written explanation be given if his request for a transfer were denied: "I am not aware of any reasons that would prohibit me from this requested transfer to an enforcement position in patrol; but if any exist, I would appreciate being advised in writing so that the issue could be confronted and resolved."[22] His letter was insufficient to

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[22] In his letter to Chief Barnett, Breaux asked permission "to transfer back to the uniform patrol division during the next seniority selection process" in the fall of 1994. Barnett granted Breaux's request, and Breaux returned to patrol duty in November 1994.

state a complaint under General Order 76-29 or to exhaust under the Whistleblower Act.[23]

2. Ambrogio's appeal

Ambrogio appeals only the taxing of some of the City's costs against him. In its May 8, 1998, Amended Judgment, the district court dismissed all claims against the City and taxed 40% of the City's costs of court against Ambrogio. This court reviews a district court's award of costs for an abuse of discretion. *Fogleman v. ARAMCO*, 920 F.2d 278, 285 (5th Cir.1991).

The taxation of costs is allowed "as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.P. 54(d)(1). In this case, the City clearly prevailed against Ambrogio. None of Ambrogio's claims against the City went to the jury, and he does not appeal the district court's pretrial dismissal of those claims. On appeal, Ambrogio does not explain how the district court abused its discretion in apportioning costs against him.

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[23] The case Breaux cites for broadly construing his alleged complaint is distinguishable. In *Farrar*, the court found that a letter complaining of a demotion "without just cause" was sufficient to provide notice that the complaint was about "retaliatory employment practices." *Farrar*, 933 S.W.2d at 774. But Farrar, unlike Breaux, had written a letter specifically to a grievance committee, initiating a committee hearing about Farrar's demotion.

IV. CONCLUSION

The police officers failed to make out a First Amendment retaliation claim. Even though they persuaded the jury, and we have assumed, that they truthfully spoke out to reveal political investigations of public officials, the exercise of First Amendment rights is not enough. The retaliation they complained of – investigations, criticisms, public (but withdrawn) reprimands, psychological and polygraph testing, suspension with pay, transfer to the TRU – do not, either individually or collectively, constitute adverse employment actions. The actions taken by Hensley and Holifield did not give rise to § 1983 liability. For reasons previously explained, we have rejected the other issues raised on appeal.

This court reverses the judgment for the Plaintiffs on their § 1983 claims against the individual Defendants and renders a take-nothing judgment against the Plaintiffs on these claims. We affirm the district court's dismissal of the City as a Defendant and the taxing of costs against Ambrogio.

AFFIRMED IN PART; REVERSED AND RENDERED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALLEN BREAUX and JOE AMBROGIO,	§	
Plaintiffs,	§	Civil Action No.
VS.	§	3:94-CV-2291-D
THE CITY OF GARLAND, TERRY HENSLEY, and RON HOLIFIELD,	§	
Defendants.	§	

AMENDED JUDGMENT

(Filed May 8, 1998)

In this civil action, the court granted summary judgment in part in favor of defendants The City of Garland, Texas (the "City"), Terry Hensley ("Hensley"), and Ron Holifield ("Holifield") in memorandum opinions and orders filed September 11, 1995 and October 14, 1997. Thereafter, the parties tried to a jury plaintiff Allen Breaux's ("Breaux's") claim against the City alleging a violation of the Texas Whistleblower Act, and plaintiffs Breaux's and Joe Ambrogio's ("Ambrogio's") claims against defendants Hensley and Holifield, pursuant to 42 U.S.C. § 1983, alleging violations of plaintiffs' First Amendment rights. The court filed a judgment on November 12, 1997 awarding relief in accordance with the memorandum opinions and orders filed September 11, 1995 and October 14, 1997, a memorandum opinion filed November 12, 1997, and the jury verdict.

Thereafter, the City filed a motion for judgment as a matter of law, motion to alter or amend the court's final judgment, and motion for new trial or for an order of remittitur; Hensley filed a renewed motion for judgment as a matter of law and motion for new trial, for remittitur, and/or to alter or amend judgment; Holifield filed a renewed motion for judgment as a matter of law, for new trial, for remittitur, and/or to alter or amend judgment; and plaintiffs Breaux and Ambrogio filed a motion to amend judgment, and motion for recovery of attorney's fees and related expenses. The court decided those motions by memorandum opinion and order filed April 17, 1998. It denied Hensley's and Holifield's motions for new trial as to damages, conditioned on Breaux's accepting a remittitur of $321,241.25 ($279,500 + $41,741.25) in actual damages, and Ambrogio's accepting a remittitur of $360,000 in actual damages and $3 million in punitive damages. Breaux and Ambrogio filed their remittitur on May 7, 1998.

For the reasons stated in its prior memorandum opinions and orders, and plaintiffs' having filed their remittitur, the court enters judgment as set forth below.

I

It is ordered and adjudged that plaintiffs' claims against the City are dismissed with prejudice.

The taxable costs of court incurred by the City are assessed 60% against Breaux and 40% against Ambrogio.

II

It is ordered and adjudged that Breaux recover judgment from Hensley and Holifield, jointly and severally,

1. in the principal sum of $6,258.75; and

2. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum.

III

It is ordered and adjudged that Breaux recover judgment from Hensley

1. In the principal sum of $200,000.00;

2. punitive damages in the sum of $2 million;

3. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum;

4. reasonable attorney's fees and expenses, as set forth in ¶ VIII of this judgment; and

5. taxable costs of court, as calculated by the clerk of court.

IV

It is ordered and adjudged that Breaux recover judgment from Holifield

1. In the principal sum of $200,000.00;

2. punitive damages in the sum of $2 million;

3. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum;

4. reasonable attorney's fees and expenses, as set forth in ¶ VIII of this judgment; and

5. taxable costs of court, as calculated by the clerk of court.

V

It is ordered and adjudged that Ambrogio recover judgment from Hensley and Holifield, jointly and severally,

1. in the principal sum of $2,256.00; and

2. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum.

VI

It is ordered and adjudged that Ambrogio recover judgment from Hensley

1. In the principal sum of $200,000.00;

2. punitive damages in the sum of $2 million;

3. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum;

4. reasonable attorney's fees and expenses, as set forth in ¶ VIII of this judgment; and

5. taxable costs of court, as calculated by the clerk of court.

VII

It is ordered and adjudged that Ambrogio recover judgment from Holifield

1. In the principal sum of $200,000.00;

2. punitive damages in the sum of $2 million;

3. post-judgment interest, commencing November 12, 1997, at the rate of 5.42% per annum;

4. reasonable attorney's fees and expenses, as set forth in ¶ VIII of this judgment; and

5. taxable costs of court, as calculated by the clerk of court.

VIII

It is ordered and adjudged that Breaux and Ambrogio recover from Hensley and Holifield, jointly and severally, attorney's fees and expenses in the sum of $361,681.56.

IX

The court dismisses the remainder of plaintiffs' claims with prejudice. All relief not expressly granted by this judgment is hereby denied.

Done at Dallas, Texas this 8th day of May, 1998.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

Constitutional And Statutory Provisions Involved

U.S. Const., Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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No. 99-1863

Supreme Court, U.S.
FILED
JUN 21 2000
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

ALLEN BREAUX and JOE AMBROGIO
Petitioners,

v.

CITY OF GARLAND, TERRY HENSLEY, and RON HOLIFIELD
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE PETITIONERS

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20 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. The Fifth Circuit's holding of what constitutes actionable adverse employment action is unrealistically restricted and blindfully ignores the seriousness and increasing frequency of subtle and camouflaged retaliation against public safety officers for exercising their First Amendment rights. 6

II. Just one retaliatory action can constitute a chilling effect to prevent or punish for the exercise of free speech rights and thus give rise to constitutionally actionable injuries, as held by other federal circuit courts of appeals. Thus, seven instances of serious retaliatory action in this case should unquestionably constitute an actionable injury. 10

CONCLUSION 14

TABLE OF AUTHORITIES

Cases Page(s)

Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209 (1st Cir. 1989) 12

Benson v. McQueen, (E.D.N.C. 7:98-CV-164-DEN), Deposition Testimony 6

Brady v. Ford, 145 F.3d 691 (5th Cir. 1998) 7

Brawner v. City, 855 F.2d 187 (5th Cir. 1988) 7

Breaux et al. v. City of Garland et al., 205 F.3d 150 (5th Cir. 2000) 3,4

Crady v. Liberty, 993 F.2d 132 (7th Cir. 1993) 13

Dahm v. Flynn, 60 F.3d 253 (7th Cir. 1994) 13

Donahue v. Board of Fire Commissioners, 834 F.2d 54 (2nd Cir. 1987) 13

Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999) 12

Garrity v. New Jersey, 385 U.S. 493 (1967) 11

Gooding v. Wilson, 405 U.S. 518 (1972) 11

Marbury v. Madison, 5 U.S. 137 (Cranch, 1803) 6

Marohnic v. Walker, 800 F.2d 613 (6th Cir. 1986) 13

NAACP v. Claiborne, 458 U.S. 886 (1982) 7

National v. Town of Dedham, 43 F.3d 731 (1st Cir. 1995) . 7

Perry v. McGinnis, 209 F.3d 597 (6th Cir. 2000) 11

Pieczynski v. Duffy, 875 F.2d 1331 (7th Cir. 1989) 14

Rakovich v. Wade, 819 F.2d 1393 (7th Cir. 1987) 12

Rutan v. Republican Party, 497 U.S. 62 (1990) 10

Scott v. County, 180 F.3d 913 (8th Cir. 1999) 7

Sexton v. Martin, 210 F.3d 905 (8th Cir. 2000) 7

Smith v. Fruin, 28 F.3d 646 (7th Cir. 1994) 13,14

Tao v. Freeh, 27 F.3d 635 (D.C. Cir. 1994) 13,14

Wagner v. Texas, 939 F. Supp. 1297 (S.D. Tex. 1996) ... 14

Wallace v. Benware, 67 F.3d 655 (7th Cir. 1995) 14

Waters v. Churchill, 511 U.S. 672 (1994) 7

Worrell v. Bedsole, 110 F.3d 62 (4th Cir. 1997) 7

Yoggerst v. Stewart, 623 F.2d 35 (7th Cir. 1980) 13

Constitutional and Statutory Provisions

U.S. CONST. Amend. I and Amend. XIV ..... passim

42 United States Code § 1983 ..... passim

Other Authorities

SAM ERVIN, PRESERVING THE CONSTITUTION, 210 (1984) 15

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. ("NAPO") and its affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, respectfully submit this brief in support of the Petitioners for a writ of certiorari in this case.[1]

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States. Specifically, NAPO is a coalition of police associations and unions that serves to advance the interests and rights of law enforcement officers through legal advocacy, education, and legislation. NAPO represents 4,000 law enforcement organizations, with over 220,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel) and 11,000 retired officers. The Petitioners are currently members of, and at the time of the constitutional violations giving rise to this lawsuit, were officers of the Garland Police Officers Association (GPOA), which is a member of NAPO (through its membership in a statewide umbrella association).

In addition to the Petitioners, law enforcement officers (and their labor organizations) throughout the Fifth Circuit are directly implicated by the U.S. Court of Appeals' extremely restrictive view on the levels of retaliatory actions by public

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[1]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amici curiae* and its members, made a monetary contribution to the preparation or submission of the brief. Both the Petitioners and the Respondents have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court, pursuant to Supreme Court Rule 37.3(a)

employers which constitute a "chilling effect" on the exercise of their First Amendment rights (as applied to them through incorporation under the Fourteenth Amendment). Officers and their labor organizations, not only in the Fifth Circuit but elsewhere, have a significant interest in resolving the confusing state of the law concerning recovery for damages when their fundamental rights under the First Amendment are violated through serious retaliatory actions. Hence, it is imperative that those rights be protected, not allowed to go unaddressed and unremedied, as they were in this case and as happens in other cases throughout the nation.

SUMMARY STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement in the petition for writ of certiorari. What follows is a shorter narrative of the facts and proceedings.

This case involves the First Amendment retaliation claims of two police officers, Allen Breaux and Joe Ambrogio, the Petitioners, against the City of Garland, Texas, its former Police Chief, Terry Hensley, and its former City Manager, Ron Holifield, the Respondents. The two officers alleged that these two officials violated 42 U.S.C. § 1983 by seriously infringing their constitutional rights to free speech and free association. Specifically, the officers alleged retaliation against them for making private and public allegations of corruption in the Garland Police Department, which included expressions of concern about political investigations of city council members.

While not fired from their positions, the officers suffered through a campaign of retaliatory harassment by their supervisors, who were involved in the allegations of corruption and were therefore motivated by a desire to punish the officers for their speech on this matter of public concern. The following adverse employment actions were taken against the officers: 1)

"trumped-up" Internal Affairs charges, 2) repeated interrogations of the officers during a clearly biased investigation of the charges, 3) suspension with pay by Hensley, the official whom the Petitioners accused of abuse of power and retaliation, 4) defamatory public reprimands posted on the police department's "Wall of Shame" and disseminated to the media, 5) a 3½ day mental stability exam which included psychological and polygraph testing, 6) gag orders that continued even after the charges against the officers were resolved, effectively disabling them from defending against attacks on their reputations, and 7) threats to terminate the officers if the officers did not sign false confessions in the form of apology letters drafted by Hensley, which they refused to do.[2]

The jury found the individual Defendants liable; the court had previously granted a summary judgment for the City, on the ground that Hensley and Holifield did not have "final policy-making authority" for the City with respect to "police officer employment decisions." After a seven-day trial, the jury found Hensley and Holifield individually liable, awarding to the plaintiffs a total of $27.7 million in actual and punitive damages and costs, which was reduced by the court to just over $8 million, with the Plaintiffs accepting this remittitur plus attorneys' fees.

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[2]It appears that the retaliation against the officers began after Holifield expressed concern with tactics of the officers' union, the Garland Police Officers Association (GPOA); he allegedly threatened to "destroy" the GPOA if it acted "politically" with respect to these allegations (concerning illegal political investigations being run by Hensley) and to results of a management survey of GPOA members. Breaux, infra, 205 F.3d at 153. The threats against the GPOA are not at issue here, but this is relevant because both Petitioners were officers in GPOA at the time.

Both sides appealed the verdict to the Fifth Circuit Court of Appeals. Breaux et al. v. City of Garland et al., 205 F.3d 150 (5th Cir. 2000). The Fifth Circuit recognized the factual basis for the verdict against the individual defendants. The court stated in its opinion, "The jury was persuaded that [the officers] became objectives of a vendetta by Chief Hensley and City Manger Holifield, once they blew the whistle on politically-motivated investigations of Garland City Council members by the City's top employees." 205 F.3d at 156.

Notwithstanding the corroborating evidence, the Fifth Circuit panel ruled against both officers "because the Plaintiffs failed to prove that official retaliation against them was sufficiently serious to constitute a constitutional injury." The Court found that all the reprisals and retaliatory actions against the officers did not constitute, either individually or collectively, the adverse employment actions necessary for a First Amendment retaliation claim. It stated: "Even though they persuaded the jury, ... and they truthfully spoke out to reveal political investigations of public officials, the exercise of First Amendment rights is not enough" and that the "actions taken by Defendants Hensley and Holifield did not give rise to 1983 liability." It also rendered a "take-nothing judgment against the Plaintiffs on these claims." 205 F.3d 164, 165.

This petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

This Court should grant this petition and accept review for two reasons: First, protection against and remedies for First Amendment violations are very important, particularly to the law enforcement profession and citizens who benefit from officers who report governmental malfeasance, corruption, or other matters of public concern. Second, this Court's review would resolve the inconsistencies and conflicts between the

Fifth Circuit and most other federal circuits concerning the level of retaliation necessary for actionable constitutional injury, and thus would provide clear directives to lower courts and government agencies.

State and local law enforcement officers and other public employees should be able to engage in what would be clearly protected exercises of free speech, without suffering all types of reprisals and retaliatory adverse actions (short of dismissal, suspension without pay, or demotion). The Fifth Circuit's holding in this case means that such retaliatory actions, taken all together, are not actionable under 42 U.S.C. § 1983 within Texas, Louisiana, and Mississippi.

There is a substantial conflict of decisions between the Fifth Circuit, on the one hand, and the Seventh, Second, Fourth, First and District of Columbia Circuits, on the other hand, as to whether various types of retaliatory adverse employment actions— other than the loss of a job, suspension (without pay) or demotion—constitute retaliatory actions which chill free speech and are thus actionable for a violation of a public employee's constitutional rights.

Law enforcement officers and other public employees throughout the United States should be guaranteed equal treatment under the law. Seven retaliatory actions collectively taken against an officer should not be held to be constitutionally permissible in one federal circuit, while at the same time, each of the retaliatory actions considered separately would likely be condemned as a constitutional violation in several other federal circuits. The availability of a remedy under § 1983 for constitutional violations should not depend on the federal circuit in which an officer performs his duty to protect and serve. More uniformity throughout the nation is needed, in view of the preeminence of the First Amendment's protections.

Unless this decision is reviewed by this Court, in the Fifth Circuit and possibly other federal circuits in the future, the First Amendment will provide a constitutional right without a remedy for public employees. This is because government agencies in the Fifth Circuit now have a "green light" to impose as many types of serious adverse employment actions on their employees as possible—short of actual dismissal, suspension, or demotion—in order to coerce and pressure employees who have spoken out on matters of public concern, even to the point of forcing their resignations. Law enforcement officers will be especially susceptible to such retaliation, because of the hierarchy within their departments and the availability of disciplinary action for the most minor infractions.[3] In Marbury v. Madison, 5 U.S. 137, 163 (Cranch) (1803), this Court explained: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

ARGUMENT

I. The Fifth Circuit's holding of what constitutes actionable adverse employment action is unrealistically restricted and blindfully ignores the seriousness and increasing frequency of subtle and camouflaged retaliation against public safety officers for exercising their First Amendment rights.

The late 1990's demonstrated a continuing increase in

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[3]The plight of many of America's law enforcement professionals is summed up by New Hanover County, NC, Sheriff Joseph McQueen, as follows: "They serve at the whim of the Sheriff." Benson v. McQueen, (E.D.N.C. 7:98-CV-164-DEN), Deposition Testimony, at 443. This prevalent attitude creates an environment that leads to the types of continuing retaliation to which Officers Breaux and Ambrogio were subjected.

across-the-board retaliation against law enforcement officers and also other public employees who communicate about malfeasance or corruption within their agencies or other matters of important public concern. The reported appellate decisions in law enforcement free speech cases in recent years demonstrate the gravity and significance of First Amendment protections[4] for these officers.[5]

In order for law enforcement officers to successfully perform their difficult and potentially deadly duties to serve and protect, they need to be confident that they are free to speak out and communicate about problems within their departments and agencies, particularly when the concerns involve retaliation, malfeasance, and corruption, including politically-inspired

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[4]For example, Sexton v. Martin, 210 F.3d 905, 911 (8th Cir. 2000), "Freedom of speech is among the most precious of our constitutional rights." National v. Town of Dedham, 43 F.3d 731, 736 (1st Cir. 1995). "Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." NAACP v. Claiborne, 458 U.S. 886, 913 (1982). "The First Amendment demands a tolerance of verbal tumult, discord, and even offensive utterance." Waters v. Churchill, 511 U.S. 661, 672 (1994).

[5]Scores of cases demonstrate how law enforcement officers, are often subject to egregious and protracted retaliation because of simple expression. See, e.g., Scott v. County, 180 F.3d 913 (8th Cir. 1999); Brady v. Ford, 145 F.3d 691 (5th Cir. 1998); Brawner v. City, 855 F.2d 187, 191-92 (5th Cir. 1988)("the disclosure of misbehavior by public officials is a matter of public interest and therefore deserves the constitutional protection, especially when it concerns the operation of a police department."); Worrell v. Bedsole, 110 F.3d 62 (4th Cir. 1997)(a lieutenant pressed the sheriff with repeated complaints about personnel shortages and equipment breakdown; such speech was held protected).

investigations of public officials, clearly constitutionally protected as were the statements in this case.

A review of recent court decisions, infra, demonstrate widespread patterns of retaliation against whistleblowing law enforcement officers, as well as other public employees. Many agency management officials who engage in retaliation against law enforcement officers and other public employees for protected free speech activities act more blatantly, than did the officials in this case, by imposing the more traditional and severe forms of retaliation, namely termination, suspension (without pay), and demotion. These public officials proceed recklessly and clearly disregard the First Amendment; this subjects them occasionally to § 1983 liability and damages, as confirmed by both state and federal appellate decisions upholding judgments against such officials.

Through specific, real-world experiences, provided by law enforcement officers or their attorneys when requesting guidance from the NAPO's National Law Enforcement Officers' Rights Center concerning retaliatory acts taken against them, *amicus curiae* NAPO has learned that the more sophisticated and less brutal retaliation has become more frequently committed like other forms of contemporary discrimination in the workplace: It is typically done in camouflaged and subtle means of retaliation designed to intimidate officers and chill their constitutional free speech expression rights, often attempting to coerce "voluntary resignations".

Sophisticated retaliators communicate in many ways, less often through direct means which can be more readily revealed, captured (by documentation or otherwise), addressed by senior management, and remedied in federal litigation. Contemporary retaliation often forms in smoke-filled back rooms in law enforcement departments throughout the nation.

Although adverse employment action in its most extreme form, i.e. through loss of a job and pay, arguably has a more immediate economic impact upon the law enforcement officer, arguably less severe forms of retaliation can similarly have serious ramifications for the officer and his or her family. The substantial adverse effects of less severe retaliation include demoralization, intimidation, and serious physical and emotional distress, among others, often resulting in less effective on-the-job performance.

These consequences are clear, for example, by just focusing on two of the seven instances of retaliatory actions that occurred in this case. The "trumped up" internal affairs charges against the Petitioners and the resulting investigation were a form of severe retaliation. This is because such charges and the following investigation cause law enforcement officers to incur substantial legal expense and suffer personal humiliation in defending themselves against such charges. Trumped up and unfounded charges often have a deterrent and chilling effect upon other officers, as well as other public employees. Furthermore, few events are more stressful and demoralizing to a law enforcement officer than to be subjected to unnecessary and purely punitive internal affairs investigations resulting from trumped up charges, as a consequence of exercising their First Amendment rights.

The case before the Court presents an overwhelming pattern and practice of retaliation against the Petitioners, as demonstrated by the seven instances of adverse action taken against them. In essence, the totality of the course of retaliatory action taken against Officers Breaux and Ambrogio is among the most vile course of retaliatory conduct set forth in any published decision, short of the additional consequence of termination.

II. Just one retaliatory action can constitute a chilling effect to prevent or punish for the exercise of free speech rights and thus give rise to constitutionally actionable injuries, as held by other federal circuit courts of appeals. Thus, seven instances of serious retaliatory action in this case should unquestionably constitute an actionable injury.

A

The petition for writ of certiorari, at 22-27, outlines the four different approaches to what constitutes actionable adverse action under § 1983. Therefore, for the most part, that analysis is not repeated herein. The more responsible and realistic approaches in determining adverse action, to remain faithful to First Amendment's protection of free speech, are the cases which recognize any definitive discipline and those which recognize the "objective chilling" standard.

This Court's observation in Rutan v. Republican Party, 497 U.S. 62, 76 n.8 (1990) sets a low threshold. The First Amendment protects public employees from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee...when intended to punish her for exercising her free speech rights." That observation has created some confusion among the federal circuit courts as they have attempted to develop methodological tests to determine on a case-by-case basis the sufficiency of actionable adverse employment action. Rutan and other cases cited in the instant petition for writ of certiorari manifest that this Court has recognized that the appropriate minimum threshold necessary for actionable adverse actions is in fact varied and encompasses a broad level of different types of retaliation, contrary to the unrealistically narrow and list-driven approach of the Fifth Circuit in this case.

Traditional First Amendment doctrine emphasizes the

adverse effects, the negative impacts and consequences, commonly known as the "chilling effect" of governmental punishment. See Gooding v. Wilson, 405 U.S. 518, 521 (1972). Many types of retaliatory adverse action, in addition to actual termination, suspension without pay or demotion, can sufficiently cause this chilling effect on law enforcement officers and other public employees exercising their lawful free-speech rights. "[R]etaliation by a government employer against an individual who exercises his First Amendment rights constitutes a First Amendment violation." Perry v. McGinnis, 209 F.3d 597, 604 (6th Cir. 2000).

Many law enforcement officers are perceptive because of their training and the usefulness of that trait in investigating crime. This makes them particularly well positioned to discover internal corruption or other wrongdoing. At the same time, it also enables them to recognize when the "whip is being cracked" by management and a chilling message is being sent throughout the department. When retaliation is collectively directed against officers in seven different ways, as occurred in this case, the chilling effect is clear, definitive, and strikes at the heart of the First Amendment's protections. Without such protections, law enforcement officers will be discouraged from uncovering and ultimately reporting matters of great importance to the public.

This Court's pronouncement over thirty years ago should be reaffirmed: Law enforcement officers are not "relegated to a "watered down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 500 (1967). Unfortunately, the Fifth Circuit's decision in this case has relegated law enforcement officers throughout the Fifth Circuit to "a watered down version of constitutional rights", inconsistent with this Court's teachings in past decisions.

B

Because public sector workplaces often become a battleground for disgruntled supervisors to carry out political and other illegitimate missions, courts have recognized a multitude of conduct as being constitutionally actionable under the First Amendment. Scores of law enforcement expression cases demonstrate the chilling effects associated with various forms of management retaliation.

For example, in Rakovich v. Wade, 819 F.2d 1393 (7th Cir. 1987), the court held that even an investigation of a police officer as a result of his expression, as occurred in this case, is actionable under the First Amendment. Other cases show how virtually all types of changes in terms and conditions of employment trigger application of the Rutan doctrine. See Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209 (1st Cir. 1989)(en banc)(imposition of burden on employee that makes job inferior invokes application of Rutan).

In Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999), the Fourth Circuit explained how the First Amendment prohibits governmental conduct which has a chilling effect upon the speaking employee. There, the adverse action at issue was the denial of Sgt. Edwards' efforts to teach an off-duty course of instruction. The off-duty course of instruction involved North Carolina's new concealed-carry-handgun law, which was controversial and undesirable according to the opinions and political preferences of the Goldsboro Chief of Police. In Edwards, the officer was confronted with a threat of termination if he taught the concealed handgun course. The court observed that the threat of termination "was intended to chill his rights to engage..." in protected expression. Therefore, the Court concluded that "the threat is actionable." 178 F.3d at 248. The Fourth Circuit's approach in Edwards was consistent with this Court's decisions, and its decision was predicated on

the deterrent effects of government retaliation.

In Smith v. Fruin, 28 F.3d 646, 649 n.3 (7th Cir. 1994), the Seventh Circuit explained: "[E]ven minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures." In Smith, the court observed that the assignment of a police officer to a surveillance assignment could constitute an actionable adverse action.

There are other federal circuit decisions providing a remedy for various other types of harassment and retaliation. In Donahue v. Board of Fire Commissioners, 834 F.2d 54, 59 (2nd Cir. 1987), a pattern of harassment, including the retention of an employee's personal diary and disclosure of its contents, could be actionable. In Yoggerst v. Stewart, 623 F.2d 35, 39 (7th Cir. 1980), a verbal reprimand and notation in a personnel file was sufficient to support an employee's claim. In Crady v. Liberty, 993 F.2d 132, 135 (7th Cir. 1993), the court observed that a demotion, a less distinguished title, a loss of benefits, significantly diminished responsibilities, or other indices are relevant to establishing an actionable claim.

Other federal circuit courts have provided a remedy for a single retaliatory act. In Tao v. Freeh, 27 F.3d 635 (D.C. Cir. 1994), the District of Columbia Circuit held that requiring an applicant for a promotion to resubmit a lengthy application, while allowing co-workers to be reassessed on original materials, is a sufficient adverse action. In Marohnic v. Walker, 800 F.2d 613 (6th Cir. 1986), the court held that failing to provide an unqualified letter of recommendation can constitute an adverse action if the employer acted in retaliation for protected expression. In Dahm v. Flynn, 60 F.3d 253 (7th Cir. 1994), the employee-plaintiff suffered a change in job duties following testimony before a legislative committee regarding low morale in the state agency. The court concluded

that a "qualitative rather than a quantitative change" can support a claim of retaliation.

Following Rutan, a number of cases have recognized the "petty harassment doctrine" whereby the most isolated and petty harassment is constitutionally actionable under the First Amendment because of the extreme importance of First Amendment rights in our nation's jurisprudence. See Wallace v. Benware, 67 F.3d 655, 663 (7th Cir. 1995)("Campaign of petty harassment in response to views expressed during a political campaign is actionable under Section 1983 as a violation of the First Amendment"); Tao v. Freeh, supra,(requiring an additional 27 hours at work before the employee involved was allowed to qualify for a promotion was adverse action); Pieczynski v. Duffy, 875 F.2d 1331 (7th Cir. 1989)(petty harassment, consisting of taking away long distance phone service, denying requests for vacation time, not allowing employee to change her lunch hour, and not inviting her to a superior's birthday party, is actionable under the First Amendment); Wagner v. Texas, 939 F. Supp. 1297, 1314 (S.D. Tex. 1996)(a reassignment within the workplace may serve as a basis for a First Amendment claim).

All of these holdings are in stark contrast to the unduly restrictive views of the Fifth Circuit in this case. Ironically, none of these foregoing cases presents the sort of egregious and ongoing retaliation that officers Breaux and Ambrogio were subjected to. It was the totality of retaliation, in violation of the First Amendment, which served as the basis for the jury's verdict in favor of the officers and its imposition of substantial damages against the officials, as a remedy for all of the injuries suffered by the officers for these serious violations.

CONCLUSION

This case reminds one of the observations of the late

Senator Sam Ervin: "First Amendment freedoms are often grossly abused." SAM ERVIN, PRESERVING THE CONSTITUTION, 210 (1984). In order to remedy the gross abuse of First Amendment free speech activities, this Court should accept review of this case to resolve the substantial federal circuit court conflict. This would provide guidance for the state and federal courts and would ultimately create some certainty for the law enforcement profession and the public.

In addition, the questions presented in the petition for a writ of certiorari represent grave issues of fundamental importance for the hundreds of thousands of law enforcement professionals, millions of other public employees, and their families. Law enforcement officers and other public employees throughout the nation are entitled to constitutional protection from various types of harassing and retaliatory adverse employment actions, which chill and deter the exercise of free speech. At the very least, if these public employees are not entitled to such protection, they should at least know that they will not be protected and have no remedy for such violations.

Amicus curiae respectfully requests that the petition be granted. The interests of justice will be served by granting the writ and grappling with the difficult issues presented.

Respectfully submitted on this 21st day of June, 2000,

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In The

Supreme Court of the United States

ALLEN BREAUX
and
JOE AMBROGIO,

Petitioners,

v.

CITY OF GARLAND, TERRY HENSLEY
and RON HOLIFIELD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly determined, on the facts of this case, that petitioners failed to show they had suffered adverse employment action and thus did not establish a cause of action under 42 U.S.C. § 1983 alleging unconstitutional retaliation for exercise of their First Amendment rights.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION..... 9

1. Petitioners' contentions were not raised in either of the courts below 9

2. The Fifth Circuit's treatment of adverse employment action is not inconsistent with, but is actually derived from, *Rutan v. Republican Party of Illinois*.. 13

3. The Fifth Circuit's approach to adverse employment action and its result in this case do not conflict with outcomes reached in similar cases in other circuits 18

4. The Fifth Circuit's decision is correct on alternate grounds 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Acosta-Orozco v. Rodriguez-De-Rivera, 132 F.3d 97 (1st Cir. 1997) 17

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)..... 10

Agosto-De-Feliciana v. Aponte-Roque, 889 F.2d 1209 (1st Cir. 1989) 25

Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987)..... 25

Anderson v. Creighton, 483 U.S. 635 (1987) 7

Bart v. Telford, 677 F.2d 622 (7th Cir. 1982)..... 17, 20, 25

Benningfield v. City of Houston, 157 F.3d 369 (5th Cir. 1998) 13, 23, 24

Bennis v. Gable, 823 F.2d 723 (3rd Cir. 1987)..... 20

Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998)..... 11, 25

Branti v. Finkel, 445 U.S. 507 (1980) 14

Burlington Industrial, Inc. v. Ellerth, 524 U.S. 742 (1998) 15

Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991)..... 25

Colson v. Grohman, 174 F.3d 498 (5th Cir. 1999) 9, 13, 16, 17

Connick v. Myers, 461 U.S. 138 (1983)..... 7

DeGuiseppe v. Village of Bellwood, 68 F.3d 187 (7th Cir. 1995) 21, 23

Dill v. City of Edmond, 155 F.3d 1193 (10th Cir. 1998)..... 19

TABLE OF AUTHORITIES – Continued

Page

Duignan v. United States, 274 U.S. 195 (1927) 10

Elrod v. Burns, 427 U.S. 347 (1976) 14

Goffer v. Marbury, 956 F.2d 1045 (11th Cir. 1992) 22, 25

Greenberg v. Kmetko, 922 F.2d 382 (7th Cir. 1991)..... 19

Harris v. Victoria Independent School District, 168 F.3d 216 (5th Cir. 1999)..... 6

Heil v. Santoro, 147 F.3d 103 (2d Cir. 1998) 20

Illinois v. Gates, 462 U.S. 213 (1983) 12

Ingraham v. Wright, 430 U.S. 651 (1977)..... 17

Kaluczky v. City of White Plains, 57 F.3d 202 (2d Cir. 1995)..... 21

Kokkinis v. Ivkovich, 185 F.3d 840 (7th Cir. 1999) 25

Liberman v. Reisman, 857 F.2d 896 (2d Cir. 1988)..... 20

Lytle v. City of Haysville, 138 F.3d 857 (10th Cir. 1998)..... 25

McCabe v. Sharrett, 12 F.3d 1558 (11th Cir. 1994) 16, 21

McGill v. Board of Education, 602 F.2d 774 (7th Cir. 1979)..... 20

Nunez v. City of Los Angeles, 147 F.3d 867 (9th Cir. 1998)..... 21

O'Donnell v. Barry, 148 F.3d 1126 (D.C. Cir. 1998) 25

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996) 18

Patrick v. Burget, 486 U.S. 94 (1988) 10

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998) 10

Pickering v. Board of Education, 391 U.S. 563 (1968) 6, 7, 18, 22

Piecynski v. Duffy, 875 F.2d 1331 (7th Cir. 1989) 25

Pierce v. Texas Department of Criminal Justice, Institute Division, 37 F.3d 1146 (5th Cir. 1994) .. 13, 16, 19

Rogers v. Miller, 57 F.3d 986 (11th Cir. 1995) 19

Rutan v. Republican Party, 868 F.2d 943 (7th Cir. 1989) 17

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) ..... *passim*

Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999) 24

Suppan v. Dadonna, 203 F.3d 228 (3rd Cir. 2000) 25

Tao v. Freeh, 27 F.3d 635 (D.C. Cir. 1994) 25

Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) ... 17, 23

Thomsen v. Romeis, 198 F.3d 1022 (7th Cir. 2000) 25

Tyler v. City of Mountain Home, 72 F.3d 568 (8th Cir. 1995) 25

United States v. National Treasury Employees Union, 513 U.S. 454 (1995) 17

United States v. Ortiz, 422 U.S. 891 (1975) 10

United States v. Williams, 504 U.S. 36 (1992) 13

Walsh v. Ward, 991 F.2d 1344 (7th Cir. 1993) 21, 26

Waters v. Churchill, 511 U.S. 661 (1994) 26

TABLE OF AUTHORITIES – Continued

Page

Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982) 19

Youakim v. Miller, 425 U.S. 231 (1976) 12

STATUTES AND RULES

42 U.S.C. § 1983 ..... 6, 18

Fed. R. App. P. 35 12

BRIEF IN OPPOSITION

Terry Hensley and Ron Holifield respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioners Allen Breaux and Joe Ambrogio. Because the issues presented by the petition were not raised in the courts below, because petitioners have failed to demonstrate any conflict between the Fifth Circuit's decision and any decision of this Court or of another court of appeals, and because the decision below was correctly decided, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

This case, as the court of appeals noted, is "factually complex" (App. 2), and has been dominated by disputes as to the conclusions to be drawn from those facts. Petitioners' statement of the case is based on selected portions of the trial transcript, often wrenched out of context, and in some instances relies on testimony that was excluded from evidence at trial.[1] The following

[1] For example, Chief Wilson's testimony that the allegations against Breaux and Ambrogio were made to "keep them quiet" was ruled inadmissible as to respondents Hensley and Holifield by the trial judge, and the jury was instructed to disregard it as to those respondents. (21:209-10). The evidence was admitted against the City of Garland only, against which petitioners present no issue for review here. Petitioners nevertheless incorporate that testimony in their statement (Pet. 5). The district court made a similar ruling regarding then-current City of Garland Mayor Ratliff's testimony that petitioners were entitled to "a public apology and thanks" (22:65-66), which nevertheless also makes its appearance in the petition (at 9).

summary is drawn from the court of appeals' opinion, which set forth the facts viewed in the light most favorable to petitioners (App. 2).

1. In 1992 the City of Garland, Texas, hired respondent Ron Holifield to serve as its city manager. Holifield was instructed to find a new police chief from outside the department. After a search, he hired respondent Terry Hensley to serve in that position.

Shortly after assuming office, Hensley and other Garland police officers began cooperating with the FBI in investigating potential crimes committed by present and former elected officials in Garland in connection with land sales and a waste disposal contract (App. 2-3). Holifield also participated in the investigation as a confidential informant (App. 3 n.1). Because Holifield had been threatened by one of the targets of the investigations, Councilman Vernon Gaston (24:83-84), and because of evidence of intrusions into Holifield's office, the police installed a surveillance camera in that office (App. 6).

Petitioners Breaux and Ambrogio were at that time (and remain today) police officers with the Garland Police Department. They also served as vice-president and president, respectively, of an organization called the Garland Police Officers Association (GPOA) (App. 4-5). This organization was in turn allied with the Combined Law Enforcement Associations of Texas (CLEAT), a confederation of police unions and organizations that advocates using confrontational tactics in dealing with municipal governments (24:92-93; DX 136).

When Holifield learned that the GPOA was conducting a survey of Garland police officers, he called the

GPOA Board to a meeting in his office on March 9, 1994. At this meeting, Breaux complained that he had been asked by his supervisor during a truck ride in 1992 to participate in "political investigations for Charlie Hinton, the city attorney, and members of the city council" (App. 4). This statement in the city manager's office – not, as petitioners imply (*see* Pet. 3), any speech that occurred during and after the truck ride – was to form the basis for Breaux's claim at trial that he had engaged in protected speech on a matter of public concern.

Holifield reported these allegations to Hensley (App. 5). Hensley questioned Breaux's supervisor about Breaux's statement that he had been asked to participate in "political investigations," and the supervisor declared it was untrue. Hensley then commenced a police department Internal Affairs investigation against Breaux (I/A 94-12) to determine whether his statements were false.[2]

---

[2] Petitioners assert (Pet. 4, 6, 9, 20) that they were subject to unprecedented "gag" orders as part of the Internal Investigations process. As is standard practice in police departments, Garland Police Department regulations require that the parties to an Internal Affairs investigation desist from public comment about the investigation until the process is concluded (21:243-44). The process is not concluded until an appropriate sanction (if any) is determined (DX 107 at F-3-4). Once Hensley was terminated, he decided (quite properly) to leave the question of appropriate sanctions to his successor. This inevitably meant that the confidentiality requirement remained in place longer than usual, hence the "unprecedented" nature of the orders. Petitioners did not challenge the length of the confidentiality restriction as being an adverse employment action in the lower courts, and they are therefore barred from attempting to inject it into the case at this stage in the proceedings. *See* pp. 10-12, *infra*.

Shortly thereafter, the film in the surveillance camera was discovered to be missing. Because the GPOA Board had recently been in the office, and given their training as police officers might have recognized the secret camera, a second Internal Affairs investigation (I/A 94-13) was commenced to determine whether any officer at the meeting was implicated. Although the mystery of the missing film was never resolved, Ambrogio admitted during the course of the investigation that he had informed Gaston, a target of the FBI investigation (and the source of threats against Holifield), about the existence of the camera (App. 6 n.4).

As soon as this second investigation was commenced, Ambrogio contacted a lawyer for CLEAT, who advised him to go on the offensive by issuing a press release and calling a press conference. At the press conference, which took place on April 20, 1994, two days after initiation of the second Internal Affairs investigation, Ambrogio amplified Breaux's accusation, asserting that Hensley and Holifield were engaged in "illegal political investigations" (App. 6). The CLEAT lawyer embellished further, offering that Hensley had set up "a Gestapo type of . . . secret intelligence organization that is doing political investigations of police officers" (App. 7). City Councilman Gaston also spoke (App. 6). The comments at the press conference, which served as the basis for Ambrogio's contention at trial that he had engaged in protected speech on a matter of public importance, led to a third Internal Affairs investigation (I/A 94-14), this one focused on whether Ambrogio had made false public statements in violation of several general orders of the police department (App. 7).

As part of the Internal Affairs investigations, Breaux was required to take polygraph tests. On the way to one such test, Breaux told another officer that he was "surprised that someone had not already shot an Internal Affairs Investigator between the eyes" (App. 8 n.7). Upon hearing about this statement, Hensley placed Breaux on paid administrative leave and also required him to undergo a psychological examination.

All three investigations led to charges being sustained against either Breaux, Ambrogio, or both (App. 7). As required by police department regulations, the adverse rulings were publicly posted (DX 107). Hensley then commenced discussions with both Breaux and Ambrogio about appropriate sanctions. He eventually proposed that they could keep their jobs, provided they made public retractions of their accusations about improper political investigations (App. 8).

Before any disciplinary action could be taken, the City of Garland elected a new mayor, James Ratliff, who testified for petitioners at trial. Ratliff was a target of the FBI's investigation, as well as a political ally of other Garland political figures the FBI had been investigating. Ratliff immediately forced Holifield and Hensley to resign (App. 8). A few months later, a new Acting Police Chief "non-sustained" the Internal Affairs charges against Breaux and Ambrogio (App. 8).

2. The upshot of the Internal Affairs investigations was thus that petitioners suffered no reduction in pay and remained employed as Garland Police Officers, whereas respondents Holifield and Hensley were out of a job. Nevertheless, petitioners sued respondents, seeking

compensatory and punitive damages under 42 U.S.C. § 1983. Their theory was that the Internal Affairs investigations were in retaliation for petitioners' exercise of their First Amendment rights, *i.e.*, their public exposure of the supposedly illegal "political investigations" being conducted by Hensley and the FBI, with the cooperation of Holifield.

In order to establish a constitutional claim for retaliation based on an exercise of First Amendment rights, Fifth Circuit case law specifies that four elements must be established:

> First, the Plaintiffs must suffer an adverse employment decision. Second, the Plaintiffs' speech must involve a matter of public concern. Third, the Plaintiffs' interest in commenting on matters of public concern must outweigh the Defendants' interest in promoting efficiency. Fourth, the Plaintiffs' speech must have motivated the Defendants' action.

(App. 11, quoting *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999) (citations omitted)).

At trial, extensive testimony was introduced as to each of the first three of these required elements. In addition to contending that petitioners had suffered no adverse employment decision, respondents argued vigorously that petitioners' accusations of politically-motivated investigations were false, or could reasonably be regarded as false by respondents. They would also be entitled to qualified immunity if it was reasonable for them to have believed that they were not taking adverse employment action against the petitioners. If false, these accusations would not be protected speech. *Pickering v.*

Board of Ed., 391 U.S. 563, 574 (1968). If respondents reasonably regarded them as false, then respondents would be entitled to qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Respondents also maintained that the City's interest in maintaining a harmonious, efficient police department outweighed the petitioners' interest in free expression under the third element. *See Connick v. Myers*, 461 U.S. 138, 150-54 (1983); *Pickering*, 391 U.S. at 568.

The district court rejected respondents' motions for judgment as a matter of law as to each of the first three elements for establishing unconstitutional retaliation and then submitted all four elements to the jury for its determination (App. 12 n.9). The jury found respondents Hensley and Holifield individually liable. After ordering remittiturs, which petitioners accepted, the district court entered judgment against Hensley and Holifield for the total amount of $8.8 million. The largest element of the award, by far, was punitive damages.

3. The court of appeals unanimously reversed. It recognized that substantial questions were presented as to whether petitioners' accusations constituted protected speech and whether respondents were entitled to qualified immunity. But under Fifth Circuit precedent, the court of appeals explained, there was considerable uncertainty about the standard of review that applies to such claims (App. 12-13). The court of appeals decided that the standard of review question could be "deferred again for a future panel" (App. 13) because, even assuming *arguendo* that petitioners' speech was protected (*ibid.*), petitioners had suffered no adverse employment action sufficient to support a claim of constitutional violation.

In making this determination, the court of appeals carefully considered each of petitioners' individual claims of adverse employment action. The Internal Affairs investigations, polygraph testing, and psychological testing did not constitute adverse action because prior Fifth Circuit precedent had established that these sorts of inquiries, absent further negative consequences, do not rise to the level of adverse employment action (App. 15-16). Hensley's public posting of the results of the Internal Affairs investigations and his attempt to get Breaux and Ambrogio to sign letters of apology[3] were "more troubling," since prior precedent had held that "reprimands" and "threats of dismissal" could constitute adverse employment action (App. 16-17). But the reprimands were only temporary, since they had been quickly "non-sustained" by Hensley's successor (App. 17). And the court concluded that before any threat of discharge is actionable, "[s]ome benefit must be denied or some negative consequence must impinge on the Plaintiff's employment" – and nothing of the sort had occurred here (App. 19). Finally, Breaux's complaint about being transferred from patrol to a telephone response unit could not qualify as adverse action, because the transfer had been ordered by Hensley's successor, not by either of respondents (App. 20-21).

The court of appeals next turned to petitioners' contention that the totality of respondents' actions constituted a "vengeful vendetta" actionable under § 1983 (App.

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[3] The court of appeals characterization of the letters as "resignation letters" at one point in its opinion (App. 16) is inaccurate. *See* 25:56-58; 188-89; *compare* App. 8.

21). Following Fifth Circuit precedent, the court of appeals determined that the proper standard for assessing such a totality of the circumstances claim is whether respondents engaged in a "campaign of retaliatory harassment" that rises to the level of "a constructive adverse employment action" (App. 22, quoting *Colson v. Grohman*, 174 F.3d 498, 514 (5th Cir. 1999)). After reviewing the evidence again, the court found no such campaign of retaliatory harassment on the record here (App. 22).

REASONS FOR DENYING THE PETITION

Petitioners contend that the court of appeals was not entitled to determine whether petitioners had suffered adverse employment action by comparing their claims to those found to be adverse or non-adverse in prior decisional law. Instead, petitioners maintain, every case must be judged against a globalized standard that asks whether a "person of ordinary firmness" would be chilled by the employers' actions from exercising in First Amendment activity (Pet. 23). This claim – that only a single generalized standard satisfies the requirements of the First Amendment – was not raised in the lower courts, is not required by any decision of this Court, and is not the subject of any acknowledged conflict among the courts of appeals. Accordingly, the petition should be denied.

1. Petitioners' contentions were not raised in either of the courts below.

Petitioners contend that this Court should grant certiorari in order to adopt a single general standard for

identifying adverse employment action that focuses on the "effect" of the employment action on protected speech activities, rather than on the "form" of such action (Pet. 16, 17-18, 18-19). Specifically, petitioners contend the Court should adopt a standard that asks, in each case, whether the action "would be sufficient to deter (or chill) a person of ordinary firmness from continuing to engage in First Amendment activity" (Pet. 23).

These claims cannot properly be reviewed by this Court. It is well established that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will ordinarily not consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). *See, e.g., Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Duignan v. United States*, 274 U.S. 195, 200 (1927). Petitioners' contention that the claims of adverse employment action in this case should have been assessed under an "objectively chilling" standard made its initial appearance in this litigation in the Petition for Certiorari. At no previous juncture – either in the trial court or in the court of appeals – did petitioners aver that the inquiry should focus on the "effect" rather than the "form," or that an "objectively chilling" standard is required.

At trial, petitioners offered a proposed jury instruction on the meaning of adverse employment action. The proposed charge contained no reference to whether a person of ordinary firmness would have been chilled (14:1570 *et seq.*). The judge adopted a charge that was similar to petitioners' proposed charge; it too contained

no reference to whether the action would have any chilling effect (15:1742-43). Petitioners did not object to this aspect of the judge's charge (26:207-11).

On appeal, petitioners similarly made no argument that the appropriate legal standard was whether a person of ordinary firmness would be chilled from engaging in protected speech or association (Brief of Appellees Breaux and Ambrogio in the Fifth Circuit [hereinafter "Brief"] at 49-58). Nor did petitioners claim the Fifth Circuit had adopted a legal standard for identifying adverse employment action inconsistent with this Court's decisions or with the standard applied by other circuits. Indeed, petitioners' 100-page brief in the Fifth Circuit did not even cite *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the critical precedent they now claim to be inconsistent with the decision below.[4]

Instead, as reflected in the court of appeals' opinion, petitioners argued below that the Internal Affairs investigations, various "verbal attacks," the posted findings of misconduct, the alleged threat of future termination, and Breaux's temporary suspension with pay, were adverse employment actions under Fifth Circuit case law (Brief at 50-58). In addition, petitioners argued that the individual acts, taken together, amounted to a "prolonged vendetta" that was adverse employment action (Brief at 49-50). The

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[4] In addition, of the seven decisions cited in the petition as supporting an objectively chilling standard (Pet. 22-23), only one – *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998) – was cited in petitioners' brief in the court of appeals (*see* Brief at 59 n.10), and it was cited for a proposition other than the standard for identifying adverse employment action.

court of appeals carefully considered and rejected each of these arguments (App. 15-22). But the court did not consider whether petitioners had suffered adverse employment action under an "objectively chilling" standard – for the simple reason that no such contention was advanced by petitioners.[5]

Petitioners have identified no circumstance that might justify an exception to the rule that "this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Certainly, the fact that the decision below merely applied principles developed by the Fifth Circuit in earlier decisions does not excuse petitioners from bringing its challenge to those principles to the attention of the lower courts. *See Illinois v. Gates*, 462 U.S. 213, 222-23 (1983) ("the routine restatement and application of settled law by an appellate court [does] not satisfy the 'not pressed or passed upon below' rule").[6] For this reason alone, the petition should be denied.

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[5] After the court of appeals rendered its decision, petitioners did not file a petition for rehearing or suggestion for rehearing *en banc*, urging the adoption of their newly-minted objectively chilling standard. If, as petitioners now maintain, the Fifth Circuit's approach to identifying adverse employment action is inconsistent with the law in other circuits, or conflicts with this Court's decision in *Rutan*, the appropriate course would have been to call these claims to the attention of the court of appeals, in order to allow that court to reassess its approach. *See* Fed. R. App. P. 35(b)(1)(A) & (B).

[6] This Court has recognized an exception to the "preserved and passed upon" rule where the petitioner (1) was a party to the prior case establishing the challenged ruling, and (2) vigorously pressed its objections to the rule in the earlier

2. The Fifth Circuit's treatment of adverse employment action is not inconsistent with, but is derived from, *Rutan v. Republican Party of Illinois*.

Petitioners argue that review is appropriate because the court of appeals' decision conflicts with this Court's precedents, especially *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (*see* Pet. 16-19). In fact, however, the Fifth Circuit's approach to adverse employment action is not only consistent with *Rutan*, it derives directly from *Rutan*.

In a series of decisions, the Fifth Circuit has developed an approach to adverse employment action that identifies certain types of decisions as being adverse and other types of decisions as being not adverse, reserving always to plaintiffs the opportunity to show that under the totality of the circumstances a public employer has engaged in conduct that constitutes adverse employment action. *See, e.g., Pierce v. Texas Dep't of Crim. Justice, Inst. Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994) (developing initial list of adverse actions); *Benningfield v. City of Houston*, 157 F.3d 369, 376-78 (5th Cir. 1998) (elaborating on the list and summarizing intervening cases); *Colson v. Grohman*, 174 F.3d 498, 513-14 (5th Cir. 1999) (developing standard for assessing totality of the circumstances charges). This approach is a product of the Fifth Circuit's exposure to numerous First Amendment retaliation claims, and reflects an effort to provide guidance to lower courts,

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proceeding. *United States v. Williams*, 504 U.S. 36, 45 (1992). Clearly, petitioners can satisfy neither condition for such an exception.

public employers, and public employees about the scope of First Amendment rights in this sensitive area.

The Fifth Circuit's approach is similar to the one this Court adopted in *Rutan* for identifying the types of patronage practices that give rise to First Amendment concern. Prior to *Rutan*, the Court had established that discharges of nonpolicymaking employees based on their political beliefs violates the First Amendment. *See Elrod v. Burns*, 427 U.S. 347, 372 (1976); *Branti v. Finkel*, 445 U.S. 507, 517 (1980). In *Rutan*, the Court granted certiorari to decide whether this rule "extends to promotion, transfer, recall, or hiring decisions involving public employment positions for which party affiliation is not an appropriate requirement." 497 U.S. at 68. In keeping with this framing of the question, the majority opinion in *Rutan* consistently described the relevant inquiry in terms of whether specific types of employment actions are sufficiently adverse to trigger First Amendment protection. *See id.* at 65 ("promotion, transfer, recall, and hiring decisions"); *id.* at 68 ("promotion, transfer, recall, and hiring decisions"); *id.* at 72 ("promotion, transfer or recall"); *id.* at 75 ("promotions, transfer, and recalls after layoffs"); *id.* at 76 ("promotions, transfers or rehires"); *id.* at 76 ("hiring"); *id.* at 78 ("hiring"). The Court stated its holding in the same terms. *See id.* at 79 ("We hold that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support . . . ."). Thus, the Court's unit of analysis was specific employment actions, not a general inquiry into chilling effects.

To be sure, in deciding whether different sorts of employment actions trigger First Amendment protection,

Rutan considered whether those actions would deter a typical employee from engaging in protected expression or from affiliating with a particular political party. *See id.* at 73, 75. But at no point did the majority opinion suggest that the relevant inquiry in each case is whether, based on the totality of the circumstances, an objectively reasonable employee would be deterred or chilled from engaging in First Amendment activity. The Court saw its task as an appellate court to be that of announcing a rule that certain employment practices – denial of promotion, transfer, recall, and hiring – will be presumed sufficiently adverse to warrant First Amendment protection.[7]

The Fifth Circuit has followed the same approach in identifying adverse employment action in individual First Amendment retaliation cases – it has developed, through a series of cases, a list of employment actions that can be presumed to be sufficiently adverse to warrant First Amendment protection. Proceeding in this fashion, the Fifth Circuit has relied on *Rutan* as its guiding authority. Thus, in its leading decision addressing the meaning of adverse employment action, the Fifth Circuit stated:

> To establish a First Amendment violation, a public employee must demonstrate that she has

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[7] This is also the approach the Court has more recently taken to defining "tangible employment action" for Title VII purposes. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

> suffered an adverse employment action for exercising her right to free speech. *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994). Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands. *Id.* (citing *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990)). The Supreme Court in *Rutan* held that the scope of harm actionable under the First Amendment was broader than actual or constructive discharge from employment. 497 U.S. at 74. Although *Rutan* concerned practices relating to political patronage, we have applied *Rutan* to retaliation claims.

Pierce, 37 F.3d at 1149.[8] The Eleventh Circuit decision, *McCabe v. Sharrett*, referenced by *Pierce*, also relied expressly on *Rutan*:

> "Adverse employment action" is broadly defined and as a matter of law includes not only discharges, but also demotions, refusals to hire, refusals to promote, and reprimands. *See Goffer*, 956 F.2d at 1049 n.1; *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

McCabe v. Sharrett, 12 F.3d 1558, 1563 (11th Cir. 1994). Far from being in conflict with *Rutan*, therefore, the Fifth Circuit's decision below is patterned after *Rutan*.

Nor does the decision below conflict with *Rutan*'s footnote dictum suggesting that "failing to hold a birthday party for a public employee" would be actionable if done to punish an employee for exercising free speech

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[8] *See also Colson*, 174 F.3d at 509 ("While *Rutan* and its progeny addressed only political patronage, we have also applied it to cases involving public employer retaliation for employees' exercise of their free speech rights.").

rights. *See* 497 U.S. at 75 n.8. The courts of appeals have uniformly declined to read this "colorful rhetoric" as signaling any considered judgment by this Court that trivial or *de minimus* harms are sufficient to put public employers to the *Connick/Pickering* balancing test in retaliation cases. *Acosta-Orozco v. Rodriguez-De-Rivera*, 132 F.3d 97, 101 n.5 (1st Cir. 1997); *see also Thaddeus-X v. Blatter*, 175 F.3d 378, 397-98 (6th Cir. 1999) (en banc); *Colson*, 174 F.3d at 510-11 (and cases cited). The footnote dictum was a quotation from the Seventh Circuit's opinion in the *Rutan* case. *See Rutan v. Republican Party*, 868 F.2d 943, 954 n.4 (7th Cir. 1989). The Seventh Circuit, in turn, was characterizing (inaccurately as it turns out) its own earlier decision in *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). *Bart* had held that trivial actions are *not* actionable unless they form part of a campaign of retaliatory harassment. *Id.* at 625. Moreover, the footnote quotation is inconsistent with the main thrust of *Rutan*, which stressed that the case before the Court involved "significant penalties . . . imposed for the exercise of rights guaranteed by the First Amendment," 497 U.S. at 74, as well as with the general understanding that there is "a *de minimus* level of imposition with which the Constitution is not concerned." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

Petitioners' claim (Pet. 19-20) that the decision below is inconsistent with *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) is also wide of the mark. In that case, this Court considered whether another specific employment restriction – prohibiting employees from accepted honoraria for making speeches or writing books – violates the First Amendment. As in *Rutan*, the Court focused on this specific employment practice, and

asked whether it would unduly inhibit the exercise of First Amendment rights. The Court considered the extent to which the practice would interfere with speech in deciding whether it implicates the First Amendment, but the inquiry was specific to a particular practice, not a free-floating examination of "chilling effects."

In short, the Fifth Circuit's approach to adverse employment action reflects an effort faithfully to follow *Rutan* by identifying specific practices that are sufficiently adverse to trigger First Amendment protection, thereby providing guidance to the lower courts and to public employers and employees. It is petitioners' demand for a globalized standard that focuses on chilling effects in every case that is at odds with *Rutan*, not the law of the Fifth Circuit.[9]

3. The Fifth Circuit's approach to adverse employment action and its result in this case do not conflict with outcomes learned in similar cases in other circuits.

Finally, petitioners assert the existence of a far-flung conflict in the circuits over the standard for identifying adverse employment action in First Amendment retaliation cases brought under § 1983. They claim to have identified four competing approaches (Pet. 22):

1. A wide open "any discipline" approach;

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[9] Even if *Rutan* were to support the globalized standard urged by petitioners, it would do so only in the political patronage context, which this Court has recognized presents significantly different issues from cases involving employee claims of retaliation for the exercise of First Amendment rights, where the *Pickering* balancing test is employed. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996).

2. An "objectively chilling" standard;

3. A restrictive short list of actionable employment actions approach; and

4. A "substantial equivalent of dismissal" test.

Examination of the decisions petitioners cite in support of this asserted four-way circuit split reveal that it is illusory.

Petitioners' fourth category – the "substantial equivalent of dismissal" test – is by petitioners' own admission a null set (Pet. 24). At one time, the Fourth Circuit and the Seventh Circuit endorsed such an approach, but this Court in *Rutan* held that a "constructive dismissal" standard was insufficiently protective of First Amendment values. Although *Rutan* was a political patronage case rather than an individual retaliation case, all circuits (including the Fifth) have abandoned the constructive dismissal standard for both patronage and retaliation purposes. *See, e.g., Dill v. City of Edmond*, 155 F.3d 1193, 1204-05 (10th Cir. 1998); *Rogers v. Miller*, 57 F.3d 986, 991 (11th Cir. 1995); *Pierce*, 37 F.3d at 1150; *Greenberg v. Kmetko*, 922 F.2d 382, 384 (7th Cir. 1991) (en banc).

Petitioners' first category – the "wide open 'any discipline' approach" – also turns out to be empty. Petitioners cite three decisions supposedly endorsing this approach (Pet. 22). One says nothing about the appropriate standard for adverse employment action, because the issue was not presented. *See Waters v. Chaffin*, 684 F.2d 833, 837 (11th Cir. 1982) (noting that the "sole question presented" was whether the employee's speech was constitutionally protected). The other two, both of which were decided before *Rutan*, merely rejected the view that

First Amendment retaliation is limited to cases of actual discharge. *See Liberman v. Reisman*, 857 F.2d 896, 899-900 (2d Cir. 1988); *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir. 1987). The notion that the Eleventh, Second, and Third Circuits have endorsed an "any discipline" standard is further belied by the fact that each Circuit is recorded in the petition as also endorsing a different and more demanding standard.[10]

This leaves the supposed conflict between the "objectively chilling" standard and the approach followed by Fifth Circuit, which focuses on particular employment actions. The decisions said to endorse the objectively chilling standard do in fact contain language to the effect that adverse employment action is something that would deter a person of ordinary firmness from engaging in protected First Amendment activity. This formulation derives from the Seventh Circuit's 1982 decision in *Bart*, 677 F.2d at 625, where Judge Posner wrote that "[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise. . . . " This formulation was foreshadowed even earlier by the Seventh Circuit decision in *McGill v. Board of Education*, 602 F.2d 774, 780 (7th Cir. 1979), stating that "[t]he test is whether the

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[10] The Third Circuit and Eleventh Circuit make additional appearances in petitioners' list of courts adopting the "objectively chilling" standard (Pet. 23). And the decision below cites a more recent decision of the Second Circuit holding that investigation of an employee does not constitute an adverse employment action (App. 24, citing *Heil v. Santoro*, 147 F.3d 103, 110 (2d Cir. 1998)).

adverse action take by the defendants is likely to chill the exercise of constitutionally protected speech." As petitioners correctly note, these formulations have been widely cited by the lower courts, especially in decisions rendered during the 1980's.

After this Court's decision in *Rutan*, however, a number of courts of appeals began moving beyond the general formulation of *Bart* in an effort to identify specific employment actions that can be regarded as adverse as a matter of law. *See, e.g., Nunez v. City of Los Angeles*, 147 F.3d 867, 874-75 (9th Cir. 1998) (denial of promotion and adverse transfers are adverse employment actions, but "[m]ere threats and harsh words are insufficient"); *Kaluczky v. City of White Plains*, 57 F.3d 202, 208 (2d Cir. 1995) ("Adverse employment actions include discharge, demotion, refusal to hire, refusal to promote, and reprimand," citing *Rutan*); *McCabe*, 12 F.3d at 1563 (adverse employment actions include discharges, demotions, refusals to hire and promote, and reprimands, citing *Rutan*); *Pierce*, 37 F.3d at 1149. Even the Seventh Circuit is moving to supplement the *Bart* standard with more particularized rules. *See Walsh v. Ward*, 991 F.2d 1344, 1346-47 (7th Cir. 1993) (defendants were entitled to qualified immunity because no decision had clearly established that transfer to a job that eliminated opportunity for outside income was adverse employment action); *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995) (to be actionable, employment action must have "materially adverse consequences" to plaintiff). The process is the familiar one in which the law starts with a general standard, and then gradually crystalizes more

particular rules that fulfill the same purpose as the standard, but with a greater degree of certainty. This Court's decision in *Rutan*, which as noted above proceeded by identifying particular employment actions as implicating the First Amendment, is an example of this process, and has served as an example and stimulus to the same movement in the law of retaliation.

The evolution from the Seventh Circuit's general focus on chilling effects in the early 1980's to the more reticulated approach exemplified by the Fifth Circuit's recent decisions is well-captured by *Goffer v. Marbury*, one of the decisions petitioners rely upon as supporting their "objectively chilling" standard (Pet. 23). The footnote in *Goffer* reads in full as follows:

> The *Pickering* line of cases protects against not only discharge but also any adverse employment action taken by the employer that is likely to chill the exercise of constitutionally protected speech. *McGill v. Bd of Education*, 602 F.2d 774, 780 (7th Cir. 1979). *E.g., refusal to hire, demotion, reprimand, refusal to promote.*

Goffer, 956 F.2d 1045, 1049 n.1 (11th Cir. 1992) (emphasis added). As this footnote reveals, the development of a list of adverse employment actions is not an alternative to the objectively chilling approach – it is simply a reflection of the law's natural progression from general standards to more particularized rules once precedents begin to accumulate. The purpose of the general standard and the more crystalized rules is the same – to identify employment actions likely to deter persons of ordinary hardiness from engaging in speech.

Given the fundamental harmony between the general standard and more particularized rules, it is not surprising that petitioners are unable to cite a single decision that identifies a conflict between the Seventh Circuit formulation and the Fifth Circuit's approach. To the contrary, the courts have seen these authorities as reflecting different aspects of the same body of law. *See, e.g., Thaddeus-X*, 175 F.3d at 397-98 (describing Fifth Circuit's *Pierce* decision and the Seventh Circuit's *Bart* decision as adopting a "similar standard"); *DeGuiseppe*, 68 F.3d at 191-92 (relying on both *Pierce* and *McGill*).

Petitioners stress that the Fifth Circuit has said "some things are not actionable even though they have the effect of chilling the exercise of free speech" (App. 15, quoting *Benningfield v. City of Houston*, 157 F.3d 369, 376 (5th Cir. 1998)). But this is not necessarily inconsistent with the *Bart* standard, which asks whether "a person of *ordinary firmness*" would be chilled from engaging in protected speech. 677 F.2d at 625 (emphasis added). The Fifth Circuit, following *Rutan*, has sought in effect to identify those forms of employment action which, as a rule, will deter a person of ordinary firmness from engaging in speech. The Fifth Circuit has determined that discharges, demotions, refusals to hire, refusals to promote, adverse transfers, reprimands, and campaigns of harassment that rise to the level of a constructive adverse action are likely to have a chilling effect on persons of ordinary firmness. On the other hand, the Fifth Circuit has determined that criticism, investigations, psychological testing, false accusations, and polygraph examinations will not have, as a rule, this kind of impact on the person of ordinary firmness. Like any set of rules, there will be individual cases

in which the reality will diverge from the generalization embodied in the rules. But it does not follow from this that all rules should be abandoned in favor of a single generalized standard – which is the gist of petitioners' position. Petitioners' way would deprive the law of the substantial advantages of using rules, such as greater certainty and consistency among cases.

Petitioners also describe the Fifth Circuit's approach as a "rigid short list" (Pet. 25), and imply that it lacks any flexibility or capacity for refinement. There are statements in some Fifth Circuit decisions that arguably support this inference. *See Benningfield*, 157 F.3d at 376 (noting that the Fifth Circuit has "declined to expand the list of actionable actions"). More recently, however, a panel of the Fifth Circuit has clarified that "[w]e have not held this list to be exclusive and do not do so now, nor do we now expand it." *Sharp v. City of Houston*, 164 F.3d 923, 933 n.21 (5th Cir. 1999). Thus, there is no basis for saying the Fifth Circuit has authoritatively committed to a closed list of adverse employment actions. In any event, as is confirmed by this case, the Fifth Circuit is always willing to consider whether the totality of the circumstances amount to constructive adverse employment action (App. 21-22). This safety valve operates to assure that novel forms of harassment will not escape protection under the First Amendment, even if they do not fall into one of the categories of adverse employment action previously recognized.

A general standard and more particularized rules that embody the same objectives as the standard can be said to conflict only if they generate different outcomes on the same set of facts. Petitioners assert that if the

Breaux case had arisen in any other circuit, it would have been decided differently (Pet. 26). But this speculation is utterly without foundation. The petition cites seven decisions that apply the *Bart* standard or its equivalent, but none identified adverse employment action that could not also be adverse employment action under the Fifth Circuit's approach.[11] In contrast, the decision below harmonizes well with the results reached in other circuits in evaluating retaliation claims raised in a police department setting.[12] Unless and until the older *Bart* standard and the post-*Rutan* approach to identifying specific forms

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[11] Each of the seven decisions involved governmental behavior different in kind from the types of employment actions the Fifth Circuit has held do not constitute adverse employment action. *Allen v. Scribner*, 812 F.2d 426, 428-29 (9th Cir. 1987), involved a researcher removed from a research project; *Piecynski v. Duffy*, 875 F.2d 1331, 1335 (7th Cir. 1989), involved a "calculated campaign" of humiliation; *Agosto-De-Feliciana v. Aponte-Roque*, 889 F.2d 1209, 1213-20 (1st Cir. 1989), involved transfer of responsibilities to what the jury could find were "unreasonably inferior" positions; *Goffer*, 956 F.2d at 1048, involved a discharge; *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994), involved the discriminatory imposition of duplicate testing procedures to secure a promotion; *Bloch v. Ribar*, 156 F.3d 673, 678-79 (6th Cir. 1998), involved the disclosure of personal information about a non-employee rape victim; and *Suppan v. Dadonna*, 203 F.3d 228, 230 (3rd Cir. 2000), involved a failure to promote.

[12] *See, e.g., Thomsen v. Romeis*, 198 F.3d 1022 (7th Cir. 2000); *Kokkinis v. Ivkovich*, 185 F.3d 840 (7th Cir. 1999); *O'Donnell v. Barry*, 148 F.3d 1126 (D.C. Cir. 1998); *Lytle v. City of Haysville*, 138 F.3d 857 (10th Cir. 1998); *Tyler v. City of Mountain Home*, 72 F.3d 568 (8th Cir. 1995); *Busby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991).

of adverse employment action generate inconsistent outcomes, review by this Court is unwarranted.

4. The Fifth Circuit's decision is correct on alternate grounds.

Even if certiorari were otherwise appropriate in this case, review should be denied because the result reached by the court of appeals is independently required on alternative grounds. Respondents argued in the courts below that they were entitled to qualified immunity because it was not clearly established in 1994 that the Internal Affairs investigations and other actions of which petitioners complain were adverse employment actions (Brief of Appellant Hensley in the Fifth Circuit at 50, 54; Brief of Appellant Holifield in the Fifth Circuit at 44, 45). Since three judges of the Fifth Circuit have now agreed that these actions were not sufficiently adverse to support a First Amendment action, this strongly suggests that qualified immunity was established as a matter of law. *Cf. Walsh,* 991 F.2d at 1347 (qualified immunity established when law of the circuit did not identify employment action as being adverse, even if that law was subsequently reversed by Supreme Court). Similarly, respondents established that they believed petitioners' accusations of "illegal political investigations" were patently false. The record amply supports the conclusion that this belief was reasonable. It follows that respondents were entitled to judgment as a matter of law or at the very least to qualified immunity on this basis as well. *See Waters v. Churchill,* 511 U.S. 661, 675-78 (1994).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 99-1863

In The

Supreme Court of the United States

ALLEN BREAUX
and
JOE AMBROGIO,

Petitioners,

v.

CITY OF GARLAND, TERRY HENSLEY
and RON HOLIFIELD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY

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13pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY 1

I. Both Respondents' and the Fifth Circuit's Description of the Retaliatory Employment Actions Suffered by Petitioners Ignores the Jury's Verdict and the Proper Standard of Review 1

II. The Issue of Whether the Governmental Retaliation Was Sufficiently Severe to Result in Actionable First Amendment Injury Was Preserved Below 3

III. The Fifth Circuit's Approach Is Patently Inconsistent With *Rutan* 5

IV. No Other Circuit Employs a Standard That Inevitably Deprives Public Employees of a Remedy Even Though They Have Suffered Clear First Amendment Injury 8

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)..... 4

Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987).....9, 10

Bart v. Telford, 677 F.2d 622 (7th Cir. 1982) 10

Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998).....9, 10

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) 7

Edwards v. City of Goldsboro,
178 F.3d 231 (4th Cir. 1999)..... 8

Knox v. Indiana, 93 F.3d 1327 (7th Cir. 1996)..... 7

Morris v. Oldham County Fiscal Court,
201 F.3d 784 (6th Cir. 2000)..... 7

Pennsylvania Dept. of Corrections v. Yeskey,
524 U.S. 206 (1998) 4

Reeves v. Sanderson Plumbing Products, Inc.,
120 S.Ct. 2097 (2000)..... 1

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) ..... *passim*

Suppan v. Dadonna, 203 F.3d 228 (3rd Cir. 2000) ...9, 10

Tao v. Freeh, 27 F.3d 635 (D.C. Cir. 1994) 9

United States v. Nat'l Treasury Employees Union,
513 U.S. 454 (1995) 6, 7

REPLY

I. Both Respondents' and the Fifth Circuit's Description of the Retaliatory Employment Actions Suffered by Petitioners Ignores the Jury's Verdict and the Proper Standard of Review.

In their "Counterstatement," Respondents acknowledge that this case is "factually complex," and has been "dominated by disputes as to the conclusions to be drawn from those facts." (R. Br., 1). What they fail to acknowledge is that such factual disputes are to be resolved by the *jury*. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2110 (2000). And the jury in this case resolved those factual disputes in favor of the plaintiffs (now Petitioners) Breaux and Ambrogio. (R. Vol. 15: 1739-46). In deciding whether to nevertheless grant judgment as a matter of law to the losers at trial (Hensley and Holifield), the Fifth Circuit was required to draw all reasonable inferences in favor of Breaux and Ambrogio, and was not allowed to make credibility determinations or weigh the evidence. *Reeves*, 120 S. Ct. at 2110. This is because "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* Indeed, the Fifth Circuit was required to "disregard all evidence favorable to [Respondents Hensley and Holifield] that the jury was not required to believe." *Id.*

Respondent's "Counterstatement" presents a version of this case that the jury obviously rejected; it reweighs evidence and pays no heed to the standard of review. That it does little more than restate the Fifth Circuit's own recharacterization of the evidence reveals how patently the Fifth Circuit substituted its own judgment for that of the jury, the same way that it impermissibly had done in *Reeves*. *See id.* Not only did the Fifth Circuit generally put its own "spin" on the evidence, but its version especially diminished the severity of the retaliation suffered by Breaux and Ambrogio, as well as the maliciousness of their supervisors' motives. In short, the

Fifth Circuit "rewrote" Petitioners' case, and Respondents now try to do the same.

According to the Fifth Circuit (and Respondents):

- The Internal Affairs charges brought against Breaux and Ambrogio were properly motivated (because Hensley honestly believed Breaux and Ambrogio were making false statements potentially harmful to their department) and not designed to punish them for their First Amendment activities (R. Br., 3-4);
- Even the obviously "trumped up" theft charge concerning the film in Holifield's surveillance camera was reasonable because Ambrogio knew about Holifield's hidden camera (App. 6 & n.4; R. Br., 4);
- The suspension of Breaux was just "administrative leave" (App. 16; R. Br., 5);
- The psychiatric examination of Breaux was motivated by his intemperate remarks, not by his report of improper political investigations (App. 7-8; R. Br., 5);
- The reprimands publicly announcing Hensley's findings that Breaux and Ambrogio were liars was simply a routine part of the Internal Affairs process, rather than a culmination of a "trumped up" process, with a preordained result, presided over by the person who was the subject of Breaux and Ambrogio's criticism (App. 16; R. Br., 5); and
- Hensley's threat to terminate Breaux and Ambrogio unless they signed humiliating and false confessions was just "hot air" and really no more than a "proposal" that they could keep their jobs if they made public retractions of their accusations (App. 20; R. Br., 5).

The Fifth Circuit's reassessment of the evidence makes the retaliation seem appropriate and even routine – so routine that several of the governmental actions at issue could not, under the Fifth Circuit's and Respondents' view, even be seen as "retaliatory." But the jury in this case, as was its prerogative, plainly drew different inferences from the conflicting evidence, finding that the challenged governmental actions were motivated by a

desire to punish plaintiffs for their First Amendment activities, were therefore "retaliatory" rather than routine (R. Vol. 15: 1739-46), and were sufficiently severe and malicious to justify substantial compensatory and punitive damages. (R. Vol. 15: 1755-56).

Given the jury verdict, it is the *Petitioners'* Statement of the Case that must be deemed controlling: it is the only statement that draws inferences favorable to the trial victors, as this Court's recent decision in *Reeves* commands. Thus, as summarized at page 20-21 of the Petition for Writ of Certiorari, the jury reasonably could have found that Officer Breaux and Detective Ambrogio were the targets of an ill-motivated and severe campaign of retaliatory harassment orchestrated by the very individuals whom the officers had truthfully accused of abusing their power.

II. The Issue of Whether the Governmental Retaliation Was Sufficiently Severe to Result in Actionable First Amendment Injury Was Preserved Below.

In an effort to pretermit this Court's review of the serious constitutional issue posed by this case, Respondents contend that Petitioners have somehow "waived" their ability to make the arguments propounded in their Petition. (R. Br., 9-12). The issue, however, *was* raised in the Fifth Circuit – by Respondents – who claimed an absence of any retaliatory adverse employment action that was sufficiently severe to inflict actionable First Amendment injury. (Brief of Appellant Holifield, 43-44; Brief of Appellant Hensley, 50-54). Petitioners then joined issue in their Fifth Circuit brief. (Brief of Appellees Breaux and Ambrogio, 49-58). And the Fifth Circuit ruled in Respondents' favor on precisely that point. App. 14-22, 32. Thus, the relevant issue was indeed "raised," "considered," and "resolved" by the Court of Appeals, as required by the precedents quoted by Respondents. (*See* R. Br., 10, 12).

Fatal to Respondents' waiver argument is that waiver extends to *issues*, not phraseology or cases. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("issues"); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("issues"). Thus, even though Breaux and Ambrogio did not use the *Rutan* case, or the phrase "reasonably chilling," in support of their Fifth Circuit argument, nothing prohibits parties from using phrases or cases in this Court that they have not used below. The obligation to preserve *issues* is to give a court a fair opportunity to decide the issue correctly, not to winnow the number of cases (or words) that later can be marshalled in support of a party's argument that the issue ultimately was decided incorrectly. In the present case, there is simply no doubt that Petitioners have consistently argued throughout this litigation that they suffered retaliation, though short of actual discharge, that was so severe that it inflicted actionable First Amendment injury. (Brief of Appellees Breaux and Ambrogio, 49-58).

Further, Petitioners did not complain about the relevant jury instruction because there was no reason to do so. That instruction, as distinct from the Fifth Circuit's restrictive "short list" analysis, was not rigidly underinclusive in identifying potential sources of First Amendment injury. Rather, the relevant jury instruction informed the jury that:

> To prove an adverse employment action such as retaliation or discrimination, a plaintiff need not show that he was discharged, turned down for a promotion, or denied other employment benefits such as increased pay. An adverse employment action may consist of such things as a reprimand or other disciplinary action, an assignment to less a prestigious position, to less desirable working hours, or to less interesting work, or the threat to terminate the person's employment.

(R. 1742-43). Because this instruction is sufficiently flexible to permit a jury to make an "adverse employment action" finding in any case in which First Amendment injury

exists, the instruction clearly did not contain the constitutional flaw of which Petitioners complain. It is instead the Fifth Circuit's ruling that employs an analysis that will inevitably result, as it did in this case, in First Amendment injury going unremedied. Consequently, it is the Fifth Circuit's constitutional error to which the Petition for Writ of Certiorari is addressed.

III. The Fifth Circuit's Approach is Patently Inconsistent with *Rutan*.

According to Respondents, the Fifth Circuit's rigid approach is perfectly consistent with this Court's precedent, primarily because *Rutan* provides an illustrative list of retaliatory employment actions capable of inflicting First Amendment injury. (R. Br., 13-14). Under *Rutan*, however, there is a fundamental difference between 1) an illustrative list of retaliatory employment actions that have an inhibiting effect on First Amendment activities, but which does not arbitrarily preclude a governmental employee from demonstrating that other *unlisted* retaliatory actions have caused the same injurious "chilling" effect; and 2) an inflexible, exclusive list of retaliatory actions that forecloses recovery for any form of retaliation not on the list, regardless of whether those unlisted actions produce an inhibited employment environment antithetical to the First Amendment. *See* 497 U.S. at 75, 79. The former approach is sufficiently flexible to accurately identify First Amendment injury when it is present; the latter approach is rigidly narrow and underinclusive in identifying injury of First Amendment magnitude. The former approach is the one prescribed by *Rutan*; the latter is the one employed by the Fifth Circuit.[1]

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[1] Even Respondents acknowledge the Fifth Circuit's inflexibility. (R. Br., 24). Indeed, the Fifth Circuit in the present case reiterated its "narrow view of what constitutes an adverse employment action." App. 15. Nevertheless, Respondents argue that there is no basis for saying that the Fifth Circuit has

The Fifth Circuit's opinion in *Breaux*, in sharp contrast to *Rutan*, does not even go through the pretense of attempting to identify retaliatory conduct that has the effect of inflicting First Amendment injury – *i.e.*, retaliation that reasonably would be expected to inhibit (or "chill") First Amendment activities. Indeed, the Fifth Circuit expressly rejected such a standard. App. 15. Moreover, as Respondents' own characterization of the *Breaux* opinion confirms (*see* R. Br., 8-9), the Fifth Circuit's inflexible list of actionable forms of retaliation is not a means to a constitutionally acceptable end (*i.e.*, an attempt to identify actions that reasonably inhibit speech), but is an end in itself – an unconstitutional end when applied to deprive public employees of a cause of action even when the retaliation plainly has penalized and inhibited their First Amendment activities.

Respondents' attempt to reconcile *Breaux* with this Court's decision in *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995), is also flawed. According to Respondents, *Treasury Employees* focused on whether the particular employment action in that case would "unduly inhibit" First Amendment activities rather than on "chilling effects." (R. Br., 17-18). But "inhibiting" and "chilling" are synonymous. Whether the "adverse employment action" inquiry is couched in terms of "unduly inhibiting" or "reasonably chilling" is not significant. The Fifth Circuit's approach is constitutionally deficient not because of semantics, but because it does not do what this Court in *Treasury Employees* plainly requires – objectively determine whether the particular employment action(s) would reasonably cause First Amendment damage by inhibiting (or

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authoritatively committed to a closed list of actionable adverse employment actions. (R. Br., 24) (citing only a case that *refused* to expand the list). But the question in this case is not whether the Fifth Circuit's rigid short list is incapable of future expansion, but whether its use of that list already operates to arbitrarily deny a cause of action to public employees who, as here, have suffered First Amendment injury.

"chilling") public employees' First Amendment activities. 513 U.S. at 468-69.[2]

In sum, any approach that would routinely and categorically treat numerous forms of retaliation to be incapable of inflicting First Amendment injury as a matter of law, without any particularized assessment of the inhibiting effect of those forms of retaliation, is flatly inconsistent with *Rutan*. *See* 497 U.S. at 75, 79. The Fifth Circuit's analysis in *Breaux* not only elevates form over substance, it also provides an invidious blueprint that tells government employers precisely how far they can go to penalize and inhibit employee speech on matters of public concern without incurring liability. Such an approach cannot be reconciled with the First Amendment scrutiny this Court applied in *Rutan* and *Treasury Employees*.

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[2] Respondents also cite Title VII cases in support of the legitimacy of the Fifth Circuit's approach to this First Amendment issue. (R. Br., 15 n.7). Although Title VII generally contains a "tangible employment action" requirement, that requirement does not apply to hostile work environment claims, which may be based on "severe or pervasive" harassment. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). Moreover, it is far from clear that the "tangible employment action" requirement applies to Title VII retaliation claims, especially when the employee is subjected to severe or persuasive retaliatory harassment by a supervisor. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792-93 (6th Cir. 2000). Indeed, even those courts requiring an adverse employment action in Title VII retaliation cases emphasize that the requirement should not be rigidly or arbitrarily applied. *See, e.g., Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) ("The law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit."). Thus, in the two Title VII contexts most analogous to First Amendment retaliation cases – hostile work environment cases and retaliation cases – Respondents' claims about Title VII's "tangible employment action" requirement are simply not correct.

IV. No Other Circuit Employs a Standard That Inevitably Deprives Public Employees of a Remedy Even Though They Have Suffered Clear First Amendment Injury.

Respondents try to make the circuit split disappear in much the same way they attempt to make the inconsistency with *Rutan* disappear – by arguing that *Breaux* is just the Fifth Circuit's unique (and more specific) way of identifying those retaliatory actions having the reasonable capacity to inhibit employees' First Amendment activity. Once again, the Fifth Circuit's own language in *Breaux* is fatal to this rationalization. The only instance in which *Breaux* pays even lip service to the chilling of First Amendment activity is when *Breaux* expressly rejects its legal significance. App. 15. No other circuit so casually disregards the very essence of First Amendment injury.

Every other circuit ultimately focuses on the *effect* rather than merely on the *form* of the retaliation. *See* Petition, 22-24. Although every circuit recognizes, as this Court did in *Rutan*, that some retaliatory actions are so severe that they result in First Amendment injury as a matter of law – *e.g.*, termination, demotion – no other circuit exhibits the Fifth Circuit's hypermechanical rigidity in identifying retaliation that is *insufficient* as a matter of law to cause First Amendment injury. In the Fifth Circuit, the retaliation is either an adverse employment action as a matter of law (if it is on "the list") or it is legally insufficient to inflict First Amendment injury (if it is not on "the list"); no other circuit leaves so little room for a jury to assess the severity of the retaliation. Indeed, no other circuit has held a campaign of retaliation as severe as the one in *Breaux* to be insufficient as a matter of law to inflict First Amendment injury.[3]

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[3] Similarly, no other circuit has followed the Fifth Circuit in holding that a threat of discharge is legally insufficient to constitute actionable retaliation. *See, e.g., Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999) (threats of dismissal

Respondents nevertheless argue that the Fifth Circuit is in line with those circuits applying the "reasonably chilling" standard, contending that those circuits are condemning retaliatory actions "different in kind" from those the Fifth Circuit has ruled too trivial to inflict First Amendment injury. (Br., 25 & n.11). But many of the cases they cite condemn retaliation far less severe than that involved in *Breaux*, and far less severe than forms of retaliation that the Fifth Circuit routinely holds insufficiently adverse as a matter of law. For example, in *Allen v. Scribner*, 812 F.2d 426, 428-29 (9th Cir. 1987), a researcher was removed from a research project; in *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994), an employee was required to undergo duplicate testing procedures before securing her promotion; in *Bloch v. Ribar*, 156 F.3d 673, 678-79 (6th Cir. 1998), the retaliation consisted of the public disclosure of embarassing personal information; and in *Suppan v. Dadonna*, 203 F.3d 228, 234-35 (3rd Cir. 2000), an employee received low evaluations that, contrary to Respondents' reading of *Suppan*, could not even be shown to have caused a loss of promotion. Although the retaliation in *Allen*, *Tao*, *Bloch* and *Suppan* may be "different in kind" from trumped up charges, lengthy interrogations, one-sided investigations, biased adjudicatory proceedings, public reprimands, compelled psychological testing, suspension, and threats of discharge, it is irreconcilable that the employees in *Allen*, *Tao*, *Bloch* and *Suppan* had a cause of action, but Breaux and Ambrogio do not.

In the final analysis, by characterizing retaliatory employment actions as either actionable as a matter of law or inactionable as a matter of law, the Fifth Circuit

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are a potent means of inhibiting speech) (citing and quoting three Supreme Court cases). Indeed, by requiring that a threat of discharge be acted on, and become an actual discharge before a public employee has a cause of action, the Fifth Circuit ignores even the very holding of *Rutan*.

has effectively removed the issue of First Amendment injury from the jury. In virtually any case, the Fifth Circuit is able to recast as a question of law an issue that other circuits largely entrust to the jury. *See, e.g., Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (whether campaign of retaliatory harassment reaches the threshold of actionability is a question of fact for the jury); *Bloch*, 156 F.3d at 679 (6th Cir. 1998) (same); *Suppan*, 203 F.3d at 235 (3rd Cir. 2000) (same); *Allen*, 812 F.2d at 434 n.17 (9th Cir. 1987) (same). Thus, one of the most troubling aspects of the Fifth Circuit's approach is how it fosters judicial overreaching. Because the *form* of retaliation is determinative, the Fifth Circuit's own characterization of the challenged employment action effectively dictates the outcome, in utter defiance of the deference due the jury. Thus, as in the present case, an actionable "suspension" can become an inactionable "administrative leave," an actionable "public reprimand" can become an inactionable "rescinded reprimand," and an actionable "threat of termination" can become constitutionally insignificant "hot air."

Petitioners respectfully urge the Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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